ADVISORY COMMITTEE
ON
CRIMINAL RULES

Williamsburg, Virginia
October 7-8, 1999

CRIMINAL RULES
MEETING

October 7-8, 1999
Williamsburg, VA

I PRELIMINARY MATTERS

A. Remarks and Administrative Announcements by the Chair.

B. Review/Approval of Minutes of June 1999, Meeting in Portland, OR.

C. Minutes of Standing Committee Meeting, June 1999.

D. Criminal Rules Agenda Docketing.

II. CRIMINAL RULES UNDER CONSIDERATION

A. Rules Approved by Judicial Conference in Spring 1999 and Pending Before Supreme Court (No Memo).

1. Rule 32.2. Criminal Forfeitures.

B. Rules Pending Before Supreme Court (No Memo).

1. Rule 6. Grand Jury (Presence of Interpreters; Return of Indictment).

2. Rule 11. Pleas (Acceptance of Pleas and Agreements, etc).

3. Rule 24(c). Alternate Jurors (Retention During Deliberations).

4. Rule 54. Application and Exception (Conforming Amendment).

C. Rules Pending Before Advisory Committee

1. Rules 10 & 43; Report of Subcommittee on Amending Rules to Permit Videoteleconferencing for Arraignments and Other Proceedings) (Memo).

2. Rule 12.2, Notice of Insanity Defense, etc.; Substantive Amendments (Memo).

3. Rule 41, Search and Seizure; DOJ Proposed Amendment.

D. Restyling Project: Proposed Schedule (Memo).

E. Restyling Project: Third Draft of Revised Rules 1 to 9 and Second Draft of Committee Notes (Subcommittee A)

1. Rule 1. Scope

2. Rule 2. Purpose and Construction

3. Rule 3. Complaint.

4. Rule 4. Arrest Warrant or a Summons on a Complaint.

5. Rule 5. Initial Appearance.

6. Rule 5.1 Preliminary Hearing in a Felony Case Prior to Indictment or Information.

7. Rule 6. The Grand Jury.

8. Rule 7. The Indictment and the Information.

9. Rule 8. Joinder of Offenses or Defendants.

10 Rule 9. Arrest Warrant or Summons on an Indictment or Information.

F. Restyling Project: Second Draft of Rules 10 to 22 and First Draft of Committee Notes (Subcommittee B)

1. Rule 10. Arraignment.

2. Rule 11. Pleas.

3. Rule 12. Pleadings and Motions Before Trial; Defenses and Objections.

4. Rule 12.1. Notice of Alibi.

5. Rule 12.2 Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition.

6. Rule 12.3. Notice of Defense Based Upon Public Authority.

7. Rule 13. Trial Together of Indictments or Informations.

8. Rule 14. Relief From Prejudicial Joinder.

9. Rule 15. Depositions.

10. Rule 16. Discovery and Inspection.

11. Rule 17. Subpoena.

12. Rule 17.1 Pretrial Conference.

13. Rule 18. Place of Prosecution and Trial.

14. Rule 19. Transfer Within the District.

15. Rule 20. Transfer From the District for Plea and Sentence.

16. Rule 21. Transfer From the District for Trial.

17. Rule 22. Time of Motion to Transfer

G. Restyling Project: First Draft of Rules 23 to 31 and First Draft of Committee Notes (Subcommittee A).

1. Rule 23. Trial by Jury or by the Court.

2. Rule 24. Trial Jurors.

3. Rule 25. Judge; Disability.

4. Rule 26. Taking of Testimony.

5. Rule 26.1. Determination of Federal Law.

6. Rule 26.2. Production of Witness Statements.

7. Rule 26.3. Mistrial.

8. Rule 27. Proof of Official Record.

9. Rule 28. Interpreters.

10. Rule 29. Motion for Judgment of Acquittal.

11. Rule 29.1. Closing Argument.

12. Rule 30. Instructions.

13. Rule 31. Verdict.

H. Rules and Projects Pending Before Advisory Committees, Standing Committee and Judicial Conference

- Proposed amendment of Civil Rules 5, 6, and 77 authorizing service by electronic means

I. Status Report on Legislation Affecting Federal Rules of Criminal Procedure.

III. DESIGNATION OF TIME AND PLACE FOR FUTURE MEETINGS

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I-B

MINUTES [DRAFT]
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

June 21-22, 1999
Portland, Oregon

The Advisory Committee on the Federal Rules of Criminal Procedure met at Portland, Oregon on June 21 and 22, 1999 to discuss style changes to the Rules of Procedure. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Davis, Chair of the Committee, called the meeting to order at 8:30 a.m. on Monday, June 21, 1999. The following persons were present for all or a part of the Committee's meeting:

Hon. W. Eugene Davis, Chair
Hon. Edward E. Carnes
Hon. David D. Dowd, Jr.
Hon. D. Brooks Smith
Hon. John M. Roll
Hon. Susan C. Bucklew
Hon. Tommy E. Miller
Mr. Robert C. Josefsberg, Esq.
Mr. Darryl W. Jackson, Esq.
Mr. Henry A. Martin, Esq.
Mr. Laird Kirkpatrick, designate of the Asst. Attorney General for the Criminal Division
Professor David A. Schlueter, Reporter

Also present at the meeting were: Mr. Roger Pauley, Jr. of the Department of Justice, Mr. Peter McCabe and Mr. John Rabiej from the Administrative Office of the United States Courts; Ms. Laurel Hooper from the Federal Judicial Center; Judge Davis, the Chair, welcomed the attendees.

II. APPROVAL OF MINUTES OF APRIL 1999 MEETING

After several corrections were made to the minutes of the April 1999, the Committee voted unanimously to approve those minutes.

III. CRIMINAL RULES CURRENTLY UNDER CONSIDERATION BY ADVISORY COMMITTEE

A. Proposed Style Amendments to Rules 1-9, Rules of Criminal Procedure (Second Draft)

The Reporter discussed a status report/chart on the restyling project. That chart will provide an updated reference on the status of each of the restyled rules and will highlight significant changes to each rule. He noted that in reviewing Rules 1 through 9 there were a significant number of changes that might be considered by some to be "substantive" amendments, even though in effect, many are clarifying changes.

The Reporter also noted that he had prepared draft Committee Notes for Rules 1 through 9 and that he had bracketed issues or language that should be further discussed by the Committee.

Judge Smith, Chair of Subcommittee A, indicated that after the full Committee meeting in April in Washington, D.C., the subcommittee had reviewed the proposed style changes and had conducted a conference call to review those changes and resolve a number of issues that had been raised at the April meeting.

1. Rule 1. Scope.

Judge Smith explained that the Subcommittee had addressed the unresolved issue of defining terms such as "court," "magistrate," and "federal judge." Professor Stith had conducted an analysis of the first nine rules and had proposed uniform changes to the rules regarding use of those terms. Judge Miller also noted that an increasing number of courts were using magistrate judges to take guilty pleas and that it might be appropriate for the rules to reflect the actual practice in those courts. On the other hand, some members of the Committee expressed concern about whether the rules should expressly authorize justices of the Supreme Court or judges of the appellate courts to act on particular matters. In the end, the Subcommittee recommended that a provision be added to Rule 1 that would explicitly recognize that if a particular rule authorizes a United States magistrate judge to act, a justice or judge of the United States could also act. That change was approved by the Committee.

Regarding the draft Committee Note for Rule 1, several suggestions were made regarding the inclusion of standard language that would inform the reader of the purpose of the restyling effort. In addition, there was discussion concerning use of the word "unnecessary" with regard to the omission of definitions formerly located in Rule 54(c). The Committee indicated a preference for describing terms such as "demurrer," as being antiquated or anachronistic.

2. Rule 2. Purpose and Construction.

No additional changes were made to restyled Rule 2 or the accompanying note.

3. Rule 3. The Complaint.

In discussing the proposed Committee Note to Rule 3, several members of the Committee offered suggested language for the first paragraph, that could be used to describe the global style changes to the Rules.

4. Rule 4. Arrest Warrant or a Summons on a Complaint.

Discussion regarding Rule 4 focused on language in Rule 4(d)(3) concerning the issue of whether the arresting officer must have a copy of the warrant at the time of the arrest. An earlier restyled version of the rule had omitted any reference to whether the officer must have a copy. Following additional discussion, however, the Committee decided to restore language in the current rule to the effect that the officer need not have a copy but upon the defendant's request, must show the warrant as soon as possible.

The Committee suggested that the Committee Note include some discussion about use of the word "judge" in the Rule to make it clear that that term refers to the judicial officer referenced in Rule 3. Finally, several members suggested that the discussion in the Note regarding the deletion of current Rule (b)—which notes that hearsay evidence may be used to establish probable cause —should be expanded.

5. Rule 5. Initial Appearance.

The Committee discussed proposed language in Rule 5(b)(4), dealing with initial appearances in felony cases, and agreed to include language that reflects current practice, that a defendant may not be called to enter a plea before arraignment. The Committee also indicated that the accompanying Note should include a reference to the fact that the term "judge" in the Rule refers to a United States magistrate judge or a state or local officer.

6. Rule 5.1. Preliminary Hearing in a Felony Case.

The Reporter indicated that the proposed Note reflected an issue addressed earlier by the Committee—whether a magistrate judge should be permitted to grant a continuance in a preliminary hearing where the defendant objects. Under the current rule only a district judge may do so. However, acting on suggestion from the Standing Committee, the Committee had decided to amend the rule to permit the magistrate judge to do so; that amendment however, would conflict with 18 USC § 3060. Thus, the

Committee indicated that the Note should include reference to the Rules Enabling Act and the Supercession Clause.

The Committee also indicated that the Note should include additional discussion on the deletion of the reference to relying upon hearsay for probable cause.

7. Rule 6. The Grand Jury.

Judge Smith indicated that Subcommittee A had studied further the question of whether the reference in current Rule 6(e)(2) to contempt should be extended to any violation of Rule 6. He reported that Professor Stith had researched the issue and that the Subcommittee had recommended that the rule remain as it is, with the reference to contempt remaining in Rule 6(e)(7).

Addressing Rule 6(e)(3), Judge Roll raised the question whether under 6(e)(3)(C)(ii), a defendant must articulate a particularized need for the grand jury information. Following discussion, a consensus emerged that an amendment to rule was not necessary, Judge Roll indicated that he would draft suggested language to include in the Committee Note.

8. Rule 7. The Indictment and the Information.

Judge Smith indicated that after further study of the issue, the Subcommittee had recommended that the reference to "hard labor" should be eliminated. Also, additional research had led the Subcommittee to conclude that no amendment should be made to rule regarding amendments to indictments. The rule is well-settled that an indictment may not be amended unless it is resubmitted to the grand jury.

9. Rule 8. Joinder of Offenses or Defendants.

No additional changes were made to Rule 8 or the accompanying Note.

10 Rule 9. Arrest Warrant or Summons on an Indictment or Information.

Judge Smith indicated that some changes had been made to Rule 9 to conform it to similar changes in Rules 4 and 5. The Reporter noted that as with other rules, the term "court" had been bracketed pending further discussion on whether that term should be further defined or whether the term "judge" could be used instead.

B. Proposed Style Amendments to Rules 10-22, Rules of Criminal Procedure (First Draft)

The Chair asked Judge Dowd, Chair of Subcommittee B, to lead the discussion on the Style Subcommittee's proposed changes to Rules 10 through 22. Judge Dowd indicated that the Subcommittee had met in Washington, D.C. on May 25th to discuss the changes.

1. Rule 10. Arraignment & Rule 43. Presence of Defendant.

Judge Dowd noted that Rule 10 is currently being reviewed by a Subcommittee to determine whether any amendment should be made concerning arraignment by teleconferencing; nonetheless, several minor style changes were considered by the Committee.

2. Rule 11. Pleas

Judge Dowd noted that after the Subcommittee's meeting in May, that the Reporter had drafted a complete revision of Rule 11 to conform it structure and flow with actual practice in taking pleas and considering plea agreements. Following discussion on whether to continue to use the term "nolo contendere," the Committee voted (4-3-2) to change that term to "no contest."

The Committee also discussed the issue of whether to include within the rule specific guidance on what should be covered by the judge in addressing a defendant desiring to plead guilty or no contest. The Committee ultimately decided set out the specific elements of the court's advice. In particular, it decided to include in revised Rule 11(b) the requirement that the defendant be placed under oath before conducting any inquiry concerning the factual basis for the plea. Several members noted that currently, many judges place the defendant under oath and that it tends to impress upon the defendant the need to be truthful in his or her answers to the court.

There was some discussion on whether to address the practice in some courts of using judges to facilitate plea agreements. The current rule indicates that "the court shall not participate in any discussions between the parties concerning such plea agreement." Some courts believe that that language acts as a limitation only upon the judge taking the defendant's plea and thus permit other judges to serve as facilitators for reaching a plea agreement between the government and the defendant. Following discussion, the Committee decided to leave the Rule as it is, including continued use of the term "court." The Committee also asked that the Reporter include a reference in the Committee Note to the effect that it intended to make no change in existing law interpreting that provision.

In addressing proposed Rule 11(c)(2) (former Rule 11(e)) regarding disclosure of a plea agreement, Mr. Josefsberg raised the question regarding whether there might be

cases where either the government or the defense might have a legitimate need or desire not to disclose the existence of a plea agreement to the court. Following discussion, the Committee decided to leave the language as drafted, with a recommendation that the Note address Mr. Josefsberg's point.

The Committee discussed the proposed modifications to Rule 11(c)(3) to (5) concerning consideration, acceptance, and rejection of a plea agreement. Following discussion concerning the structure and flow of the subdivisions, the Committee decided to address those topics individually. The Committee further indicated that the Note accompanying Rule 11(d) (Withdrawing a Plea) should address the fact that the Rule deals separately with rejection of pleas and rejection of plea agreements.

The Committee considered a proposal by Judge Sedwick (Alaska) to amend Rule 11 to add a third exception to current (e)(6)(D). That exception would have permitted use of any government offer of a conditional plea where such was relevant at sentencing to a defendant's claim after trial that he or she was entitled to acceptance of responsibility under the Sentencing Guidelines. Following discussion of the issue, the Committee concluded that the issue does not arise with great frequency and decided not to include the new exception in the rule.

Finally, the Committee added a new subdivision, Rule 11(e) to address the issue of finality of a guilty or no contest plea after the court imposes sentence.

3. Rule 12. Pleadings and Motions Before Trial; Defenses and Objections

Although the Style Subcommittee had recommended the deletion of Rule 12(a) from the rule, the Committee decided to retain the first sentence and a portion of the second sentence of that subdivision which indicates what documents and pleas constitute "pleadings." Judges Roll and Miller will continue to research this issue to determine whether there might be other matters within that definition.

The Committee generally agreed with the Style Subcommittee's recommended revision of the Rule, including moving what is currently in Rule 12(b) to new Rule 12(d)(2).

Following discussion on the issue of whether Rule 12(c) should address setting of motions dates, the Committee indicated that the Note should make it abundantly clear that judges should schedule dates for hearings and motions. The reference to local rules was deleted from that subdivision. The Committee further indicated that the Note accompanying new Rule 12(e) (current Rule 12(f)) should reflect that the Committee intends to make no change to the current law regarding waiver of motions or defenses.

4. Rule 12.1. Notice of Alibi

The Committee generally accepted the draft revision submitted by the Restyling Subcommittee. Current Rule 12.1(d) and (e) have been switched in the restyled version. Following discussion, the Committee voted 6 to 1 to include a requirement in the rule that in providing the names and addresses of alibi and any rebuttal witnesses, the parties must also provide the phone numbers of those witnesses.

5. Rule 12.2 Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition

Discussion concerning the restyling of Rule 12.2 was deferred to a later meeting, after pending major substantive changes have been discussed and resolved.

6. Rule 12.3. Notice of Defense Based Upon Public Authority

Judge Dowd noted that there had been some discussion at the Subcommittee meeting concerning the issue of whether (as currently provided in Rule 12.3) a defendant could invoke the defense of public authority on either an actual or believed exercise of public authority. The Subcommittee had concluded that the language suggested by the Style Subcommittee might be read to provide the defendant with a "right" to assert the defense —a matter not within the purview of the Committee under the Rules Enabling Act. Thus, the Subcommittee had decided to retain the current language which recognizes, as a nonsubstantive matter, that if the defendant intends to raise the defense, notice must be given. Following discussion of the matter, the Committee decided not to make any changes in the current rule regarding the availability of the defense. The Committee decided to include in the restyled rule the requirement that the parties provide the telephone numbers of any witnesses disclosed under the rule.

7. Rule 13. Trial Together of Indictments or Informations

Judge Dowd noted that the Subcommittee had made minor changes to the restyled version of Rule 13; the last sentence of the proposed restyled version had been eliminated. That sentence read: "The government must then proceed as though it were prosecuting under a single indictment or information." The Committee concurred.

8. Rule 14. Relief From Prejudicial Joinder

The Committee briefly discussed the proposed restyling changes to Rule 14 and concurred with Subcommittee B's recommendation to adopt those changes.

9. Rule 15. Depositions

Judge Dowd noted that Subcommittee B had redrafted the proposed changes to Rule 15(a), without making any substantive changes. Instead of referring generally to "unprivileged documents or materials," the Subcommittee recommended that the following be substituted for greater clarity: "any designated book, paper, document, record, recording, data, or other material not privileged." The Committee agreed to the more inclusive language.

He noted further that new Rule 15(b) consisted of the first three sentences of current Rule 15(b). The last sentences of current (b), which address the topic of the defendant's presence at a deposition, are now located in restyled Rule 15(c). The remaining subdivisions have been renumbered.

The Committee discussed the issue of payment of expenses raised in restyled Rule 15(d). Under the current rule, if the government requests the deposition or if the defendant requests the deposition and is unable to pay for it, the court may direct the government to pay for travel and subsistence for both the defendant and his or her attorney. In either case, the current rule requires the government to pay for the transcript. The restyled rule would make some slight changes. If the deposition was requested by the government, the court *may* require the government to pay subsistence and travel expenses and the cost of the deposition transcript. On the other hand, where the defendant is unable to pay the deposition expenses, the court *must* order the government to pay subsistence, travel, and the deposition transcript costs —regardless of who requested the deposition.

With regard to restyled Rule 15(f)(2), the Committee decided to amend the rule to comport with the familiar rule of optional completeness in Federal Rule of Evidence 106. Under that rule, once a party introduces a portion of a piece of evidence, the opponent may require the proponent to introduce other parts of the evidence which ought in fairness be considered. In making this change, the Committee intended to make no substantive change and noted that the revision parallels similar language in Civil Rule 32(a)(4).

10. Rule 16. Discovery and Inspection

Judge Dowd informed the Committee that the Style Subcommittee had reorganized Rule 16 and that Subcommittee B had made minor changes to that draft. The Committee discussed restyled Rule 16(a)(2) and the question of whether the reference to 18 USC 3500 in the last sentence of that provision should be deleted as recommended by

the Style Subcommittee. Following discussion of the matter, the Committee indicated that the reference should remain; Mr. Schlueter and the Reporter will continue to review this provision.

Regarding restyled Rule 16(b) (Defendant's Disclosure) the Committee indicated that the language in that provision should track similar language in Rule 16(a)(1). In Rule 16(b)(1)(B)(ii), the Committee changed the current provision which reads: "the defendant intends to *introduce* the item as evidence" to the "defendant intends to *use* the item as evidence..." The Committee recognized that this might constitute a substantive change in the rule but believed that it was a necessary conforming change with a similar provision in 16(a)(1)(E) regarding use of evidence by the government.

In restyled Rule 16(d)(1), the Committee decided to delete the last phrase in the subdivision which refers to a possible appeal of the court's discovery order. In the Committee's view, no substantive change results from that deletion; the language is unnecessary because the court, regardless of whether there is an appeal, will have maintained the record.

11. Rule 17. Subpoena

In discussing Rule 17, members of Subcommittee B observed that in the Style Subcommittee's original draft, the word "oppressive" had been deleted from Rule 17(c)(2). After discussing the issue, the Committee decided to retain the word, so the provision will read: "On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive."

The Committee discussed the question of who may hold a person in contempt of court for refusing to comply with a subpoena under Rule 17(g). The current rule indicates that "the district court may hold in contempt [a person who disobeys] a subpoena issued by that court or by a magistrate judge of that district." Professor Schlueter will research this issue further.

12. Rule 17.1 Pretrial Conference

The Reporter noted that current Rule 17.1 prohibits the court from holding a pretrial conference where the defendant is not represented by counsel. The Committee discussed whether to remove that limitation and ultimately decided to change the rule by deleting the last sentence of the rule. Recognizing that this was a major substantive change, the Committee believed that the to leave the limitation in place might unnecessarily restrict the defendant's constitutional right to self-representation. In addition, several members noted that pretrial conferences might be particularly useful in those cases where the defendant is proceeding pro se.

13. Rule 18. Place of Prosecution and Trial

The Committee discussed the proposed style changes submitted by the Style Subcommittee and following brief discussion changed the phrase "fix the place of trial" to "set the place of trial."

14. Rule 19. [Rescinded]

There was no discussion regarding Rule 19, which has been rescinded.

15. Rule 20. Transfer From the District for Plea and Sentence

The Committee reorganized Rule 20 by blending current subdivisions (a) and (b) into new Rule 20(a). New subdivision (b) addresses the topic of the clerk's duties. After an extensive discussion regarding Rule 20(d), which deals with trials of juveniles, the Committee decided not to blend that provision in with the other provisions. Instead, the provision remains. But it has been restyled to reflect a list of procedural requirements for prosecuting a juvenile.

16. Rule 21. Transfer From the District for Trial

The Committee discussed and approved the style changes to Rule 21. After discussion concerning Rule 22, which addresses the question of the timing of motions to transfer, the Committee decided to add that rule as subdivision (d) in Rule 21.

17. Rule 22. Time of Motion to Transfer

As noted, supra, the Committee discussed a proposal from the Style Subcommittee that Rule 22 be moved to Rule 21. The Committee agreed with that proposal and redesignated Rule 22 as Rule 21(d).

VI DESIGNATION OF TIME AND PLACE OF NEXT MEETING.

The next meeting of the Committee is scheduled for October 7 and 8, 1999 in Williamsburg, Virginia.

Respectfully Submitted,

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

I-C

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 14-15, 1999
Newton, Massachusetts

Draft Minutes

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held at the Boston College Law School in Newton, Massachusetts on Monday and Tuesday, June 14-15, 1999. The following members were present:

Judge Anthony J. Scirica, Chair
Judge Frank W. Bullock, Jr.
Charles J. Cooper, Esquire
Professor Geoffrey C. Hazard, Jr.
Judge Phyllis A. Kravitch
Gene W. Lafitte, Esquire
Patrick F. McCartan, Esquire
Judge James A. Parker
Sol Schreiber, Esquire
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Chief Justice E. Norman Veasey
Judge William R. Wilson, Jr.

Judge Morey L. Sear was unable to attend. The Department of Justice was represented at the meeting by Deputy Attorney General Eric H. Holder, Jr. and Associate Attorney General Raymond C. Fisher, both of whom attended the Monday portion of the meeting. Neal K. Katyal, Advisor to the Deputy Attorney General, also participated on behalf of the Department. Judge Robert E. Keeton, former chairman of the committee, and Francis H. Fox, former member of the Advisory Committee on Civil Rules, also attended the meeting.

Providing support to the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the United States Courts; Mark D. Shapiro, deputy chief of that office; and Nancy G. Miller, the Administrative Office's judicial fellow.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Will L. Garwood, Chair
Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Adrian G. Duplantier, Chair
Professor Alan N. Resnick, Reporter

Advisory Committee on Civil Rules —
Judge Paul V. Niemeyer, Chair
Judge David F. Levi
Professor Edward H. Cooper, Reporter
Professor Richard A. Marcus, Special Reporter
Advisory Committee on Criminal Rules —
Judge W. Eugene Davis, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules —
Judge Fern M. Smith, Chair
Professor Daniel J. Capra, Reporter

Also participating in the meeting were: Joseph F. Spaniol, Jr. and Bryan A. Garner, consultants to the committee; Professor Mary P. Squiers, Director of the Local Rules Project; Patricia S. Channon, senior attorney from the Bankruptcy Judges Division of the Administrative Office; and Joe S. Cecil and Carol L. Krafka of the Research Division of the Federal Judicial Center.

INTRODUCTORY REMARKS

Judge Scirica reported that he and Judge Davis had appeared before the Judicial Conference in March 1999 to present the committee's proposed amendments to the criminal rules. He stated that most of the rules had been approved as part of the Conference's consent calendar. But the comprehensive new Rule 32.2, governing criminal forfeiture, had been placed on the Conference's discussion calendar. He added that the members of the Conference had been presented with a letter opposing the rule from the National Association of Criminal Defense Lawyers and a written response from Judge Davis.

Judge Scirica said that he described for the Conference the lengthy and meticulous process that the Advisory Committee on Criminal Rules followed in drafting the new rule, in soliciting comments and input, and in making appropriate revisions in light of the comments received from the public and the Standing Committee. He noted that several members of the Conference stated expressly that they had been very impressed by the careful nature of the work of the committees.

Judge Scirica reported that Judge Davis addressed the Conference on the merits of the proposed criminal forfeiture rule and was asked several penetrating questions. Some members, he said, expressed concern over the rule's explicit reference to the practice in some circuits of allowing courts to issue money judgments in lieu of the forfeiture of specific property connected to an offense. In the end, however, the Conference approved the new rule without change.

Judge Scirica also reported that the Federal Judicial Center was in the process of

conducting a study for the Standing Committee to document the procedures used by individual district and circuit courts to obtain financial information from parties for purposes of judge recusal. He noted that Judge Bullock had agreed to serve as the committee's liaison to the Center in connection with the study.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on January 7-8, 1999.

REPORT OF THE ADMINISTRATIVE OFFICE

Legislative Report

Mr. Rabiej reported that 20 bills had been introduced in the 106th Congress that would have an impact on the federal rules or the rulemaking process. He proceeded to describe four of the most significant bills.

He said that H.R. 771 would undo the 1993 amendments to FED. R. CIV. P. 30(b) and require, in essence, that depositions be taken down by a stenographer. He noted that the 1993 amendments had been designed expressly to save litigation costs by providing the parties with discretion to select the recording means that best suited their individual needs.

He reported that H.R. 755, the "Year 2000 Readiness and Responsibility Act," which had just passed the House of Representatives, would, among other things, federalize all "Y2K" class actions. He said that Judge Stapleton, chairman of the Judicial Conference's Federal-State Jurisdiction Committee, had written to the Congress expressing opposition to the class action provision of the bill on federalism grounds. He added, though, that Judge Stapleton had included in his letter a caveat that the judiciary's opposition to the Y2K legislation should not be construed as opposition to the extension of minimal diversity to every mass tort.

Mr. Rabiej reported that S. 353, the "Class Action Fairness Act of 1999," contained a provision that would undo the 1993 amendments to FED. R. CIV. P. 11, thereby making the imposition of sanctions mandatory for violations of the rule. He noted that several witnesses had testified against a return to the wasteful satellite litigation generated by the pre-1993 rule. He added that the Judicial Conference would continue to oppose repeal of the 1993 amendments, which focus on deterrence, rather than compensation, and provide courts with appropriate discretion to impose sanctions on a case-by-case basis.

Finally, Mr. Rabiej reported that comprehensive bankruptcy legislation had just passed the House of Representatives. H.R. 833, the "Bankruptcy Reform Act of 1999," he noted,

contained several objectionable rules-related provisions. The Director of the Administrative Office had written to the Congress seeking deletion or modification of these provisions. But, he noted, except for adding a provision dealing with rules in bankruptcy appeals, the House passed the legislation without correcting the objectionable rules-related provisions.

Administrative Actions

Mr. Rabiej reported that the volume of staff work needed to support the rules committees had increased enormously in the last few years. This, he said, was due in large measure to: (1) increased legislative activity; and (2) the initiation of special projects and studies on such topics as mass torts, class actions, attorney conduct, discovery, and technology. He noted that the increased workload of preparing, printing, and distributing materials and of staffing committee and subcommittee meetings had placed considerable stress on the staff. He added, though, that technological improvements had provided some relief and that agenda books could now be sent to the members by electronic mail.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil presented a brief update on the Federal Judicial Center's recent publications, educational programs, and research projects. (Agenda Item 4) He referred in particular to the ongoing project to survey the means used by courts to identify financial information about parties in order to avoid potential conflicts of interest for judges.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Garwood presented the report of the advisory committee, as set forth in his memorandum and attachments of May 13, 1999. (Agenda Item 5)

He reported that the advisory committee had no action items to present for approval or publication. Nevertheless, the committee was continuing to consider and approve necessary amendments to the appellate rules, and it would seek authority to publish a package of proposed changes at the January 2000 meeting of the Standing Committee.

Judge Garwood pointed out that the advisory committee had considered the proposed draft amendment to FED. R. CIV. P. 5(b) that would authorize service by electronic means. He noted that the committee had some reservations regarding certain specific provisions of the proposal, but it endorsed the approach taken by the Advisory Committee on Civil Rules. The advisory committee, moreover, believed that it was essential to provide the pilot electronic case files courts with legal authority to permit service by electronic means.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Duplantier and Professor Resnick presented the report of the advisory committee, as set forth in Judge Duplantier's memorandum and attachments of May 7, 1999. (Agenda Item 7)

Judge Duplantier reported that the advisory committee had decided not to proceed with the "litigation package" of proposed amendments that it had published for comment in August 1998. But, he said, parts of the package had been returned to the advisory committee's litigation subcommittee for further study, including proposals addressing the use of affidavits at trial and the scheduling of witnesses for hearings.

Judge Duplantier stated that the advisory committee was seeking final approval from the Standing Committee for amendments to five rules and authority to publish amendments to six rules. The advisory committee would also propose amendments to two other rules regarding electronic service, if the Standing Committee decided to publish the proposed amendment to FED. R. CIV. P. 5(b).

Action Items

FED. R. BANKR. P. 1017

Professor Resnick stated that the proposed amendment to Rule 1017(e) would permit the court to grant a request by the United States trustee for an extension of time to file a motion to dismiss a chapter 7 case under 11 U.S.C. § 707(b), even if the court actually rules on the request for an extension after the 60-day time limit specified in the rule for filing the request has expired. He added that the rule, as presently written, has been interpreted to require the court to issue its ruling before the end of the 60-day period.

FED. R. BANKR. P. 2002

Professor Resnick explained that the proposed amendment to Rule 2002(a)(6) was designed by the advisory committee as a cost-cutting measure and would take account of inflation. The current rule requires the clerk of court to send a notice of hearing to all creditors on any application for compensation or reimbursement of expenses that exceeds $500. The proposed amendment would raise the threshold amount — which has not been adjusted since 1987 — to $1,000. The clerk, however, would still have to send notices of applications of $1,000 or less, but only to the trustee, United States trustee, and creditors' committee.

FED. R. BANKR. P. 4003

Professor Resnick noted that the proposed amendment to Rule 4003(b) was similar to that proposed in Rule 1017. It would permit the court to grant a timely-filed request for an extension of time to object to a list of claimed exemptions, whether or not the court actually rules on the

request for an extension within the 30-day period specified in the rule.

FED. R. BANKR. P. 4004

Professor Resnick stated that Rule 4004(c)(1) requires the court to issue a discharge by a certain time unless one or more specified events have occurred. The proposed amendment would add an additional exception to the rule. It would provide that a discharge not be granted if a motion is pending for an extension of time to file a motion to dismiss the case for substantial abuse under 11 U.S.C. § 707(b).

FED. R. BANKR. P. 5003

Professor Resnick reported that new subdivision 5003(e) was designed to facilitate the routing of notices to federal and state governmental units. He noted that debtors, especially consumer debtors, frequently provide incomplete or incorrect addresses for governmental creditors. As a result, the appropriate governmental unit may receive a notice too late for it to act in a bankruptcy proceeding.

Professor Resnick stated that the advisory committee had been working with the Department of Justice to devise a reasonable way to improve and expedite the processing of notices to government creditors. As a result, the proposed new Rule 5003(e) would require each clerk's office to maintain, and annually update, a register of federal and state governmental agencies. The clerk would not be required to include in the register more than one mailing address for each agency.

He noted that the amendment would specify that the mailing address set forth in the register is conclusively presumed to be a correct address. The debtor's failure to use that address, however, would not invalidate a notice if the agency in fact received it. In essence, then, using the address in the register would provide a "safe harbor" for debtors and would encourage use of the register.

Professor Resnick noted that a representative of state governments had urged the advisory committee to go further and require debtors use the register address. The committee, however, rejected that approach because it would be too harsh for consumer debtors. He pointed out, in addition, that the comprehensive bankruptcy legislation that had recently passed the House of Representatives contained a stronger notice requirement. It would require debtors to use the register address and require the clerks of court to update the registry quarterly, rather than annually. Judge Duplantier stated that if the legislation were to become law, the Judicial Conference would be advised promptly that the pending rule amendment would be mooted.

The committee approved the amendments to Rules 1017, 2002, 4003, 4004, and 5003 without objection.

Rules for Publication

FED. R. BANKR. P. 1007

Professor Resnick said that Rule 1007 instructs debtors as to what they must include in the list of creditors and schedules. The proposed new subdivision 1007(e) would add a requirement that if the debtor knows that a person on the list or schedules is an infant or incompetent person, the debtor must also include on the list or schedules the name, address, and legal relationship of any person on whom service should be made. The amendment would enable the person or organization that mails the notices in the case to send them to the appropriate guardian or other representative of an infant or incompetent person.

FED. R. BANKR. P. 2002

Professor Resnick stated that Rule 7001 currently requires a party to file an adversary proceeding in order to obtain an injunction. Effective December 1, 1999, however, the rule will be amended to specify that an adversary proceeding need not be filed if an injunction is provided for in a plan (i.e., an injunction enjoining conduct other than that enjoined by operation of the Bankruptcy Code itself). He explained that it is relatively common practice today for chapter 11 plans to include injunction provisions.

Professor Resnick reported that the Department of Justice originally had opposed the amendment to Rule 7001, expressing concern that affected parties would not normally become aware of an injunction in a plan unless they are served with process as part of an adversary proceeding. He noted that some government agencies had also complained that injunctions — some of which might be against the public interest — could be buried in lengthy, complex plans. He added, though, that the Department later withdrew its objection to the Rule 7001 amendment on the understanding that the advisory committee would work with it to devise appropriate solutions to the notice problem.

Professor Resnick explained that the proposed new Rule 2002(c)(3) — and companion amendments to Rules 3016, 3017, and 3020 — were designed to ensure that parties who are entitled to notice of a hearing on confirmation of a plan are provided with clear notice of any injunction included in a plan enjoining conduct not otherwise enjoined by operation of the Bankruptcy Code. The notice, for example, would have to be set forth in conspicuous language, such as bold, italic, or highlighted text.

Professor Resnick pointed out that the proposed amendments to Rule 2002(g) deal with a different problem. He explained that the clerk's office typically receives information on the addresses of creditors from three sources: (1) lists provided by the debtor; (2) proofs of claim; and (3) separate requests from creditors designating an address. He said that the proposed amendments would establish priorities or rankings to determine which address governs.

He said that the proposed new paragraph 2002(g)(3) was part of the package dealing with notice to infants and incompetent persons. (See Rule 1007 above.) It would provide that if the debtor lists the name of a guardian or legal representative in the notice, all notices would have to mailed to that guardian or representative.

FED. R. BANKR. P. 3016

Professor Resnick pointed out that the proposed new subdivision 3016(c) was a companion to the amendment to Rule 2002(c)(3) above — designed to assure that entities whose conduct would be enjoined under a plan are given adequate notice of the proposed injunction. The amendment would require that the plan and the disclosure statement describe all acts to be enjoined in specific and conspicuous language and identify all entities that would be subject to the injunction. Thus, Rules 2002(c)(3) and 3016 together would require specific and conspicuous language regarding the injunction to be included in the notice, the plan, and the disclosure statement.

FED. R. BANKR. P. 3017

Professor Resnick stated that the proposed new subdivision 3017(f) is also part of the injunction package. He noted that some chapter 11 plans contain injunctions against entities that are not parties in the case. The proposed amendment would require the court to consider providing appropriate notice to non-parties who are to be enjoined under a plan.

FED. R. BANKR. P. 3020

Professor Resnick pointed out that the proposed amendments to Rule 3020(c) are also part of the injunction package. They would require that the order of confirmation describe in reasonable detail all acts to be enjoined, be specific in its terms regarding the injunction, and identify all entities subject to the injunction. He added that notice of entry of the order of confirmation would have to be provided to all entities subject to an injunction provided for in a plan.

Professor Resnick stated that the Department of Justice was pleased with the package of amendments dealing with injunctions, and it had worked closely with the advisory committee in preparing them.

FED. R. BANKR. P. 9020

Professor Resnick reported that the advisory committee would delete the current, complex provision on contempt in Rule 9020 and replace it with a single sentence that would simply state that Rule 9014 applies to a motion for an order of contempt. Rule 9020, thus, would provide that a party seeking a contempt order proceed by way of a contested matter, rather than an adversary proceeding.

Professor Resnick explained that the current rule had been drafted soon after the bankruptcy courts had been restructured under the 1984 bankruptcy reform legislation. The 1984 legislation, in effect, deleted the explicit statutory contempt power granted to bankruptcy judges by legislation in 1978. He noted that, as a result of the 1984 legislation, it was unclear whether bankruptcy judges retained contempt power. Accordingly, the advisory committee drafted a rule, which took effect in 1987, specifying that a bankruptcy judge may issue an order of contempt, but the order may only take effect after 10 days. During the 10-day period, the party named in the contempt order may seek de novo review by a district judge.

Professor Resnick explained that a number of court of appeals decisions have been issued since Rule 9020 took effect in 1987, holding that bankruptcy judges do in fact have contempt power — either under 11 U.S.C. § 105 or as a matter of inherent judicial power. Thus, it was the opinion of the advisory committee that Rule 9020 is too restrictive and is no longer needed. He added that the committee note makes it clear that the advisory committee does not take a position on whether bankruptcy judges have contempt power or not. Issues relating to the contempt power of bankruptcy judges are substantive. The rule simply provides the appropriate procedure, i.e., through the filing of a contested matter under Rule 9014.

The committee approved the amendments to Rules 1007, 2002, 3016, 3017, 3020, and 9020 for publication without objection.

Resolution of Appreciation for Professor Resnick

Judges Scirica and Duplantier reported that Professor Resnick had just announced his intention to relinquish the post of reporter to the Advisory Committee on Bankruptcy Rules after 12 years of distinguished service. He asserted that it would be difficult to imagine anyone doing a better job than Professor Resnick and added that his personal experience in working with him had been immensely gratifying.

The committee unanimously approved the following resolution honoring Professor Resnick:

> Whereas, Alan N. Resnick, Benjamin Weintraub Distinguished Professor of Bankruptcy Law at Hofstra University, has served as Reporter to the Advisory Committee on Bankruptcy Rules for more than eleven years, beginning in late 1987, the Committee on Rules of Practice and Procedure wishes to recognize Professor Resnick for extraordinary service of the highest quality, marked in particular by
>
> - the complete revision of the Federal Rules of Bankruptcy Procedure to accommodate the creation by Congress of a national system of United States trustees to supervise the administration of bankruptcy estates and with statutory authority to raise and be

heard on any issue in a case:

- the complete revision of the Official Bankruptcy Forms in conjunction with the revision of the rules;

- the drafting and rapid distribution to the courts following further amendments to the Bankruptcy Code of suggested interim rules for local adoption to provide procedural guidance during the period required to prescribe permanent national rules implementing the statutory changes;

- the drafting of rules to facilitate the use of technology in the giving of notice to parties in bankruptcy cases and initiating the drafting of rules to permit electronic filing of documents in all types of proceedings in federal courts;

- the providing of wise counsel on bankruptcy matters to the committee's working groups on mass torts and on attorney conduct; and

- the concise and lucid presentation to the committee of proposed amendments to the Federal Rules of Bankruptcy Procedure approved by the advisory committee.

And whereas Professor Resnick has requested that he be permitted to relinquish the post of Reporter, a request that the committee has reluctantly granted,

Be it RESOLVED that the committee hereby expresses its gratitude to Professor Resnick for his exemplary drafting of rules and related explanatory materials, for his patient answers to questions from committee members, and for his unfailing collegiality.

Professor Resnick expressed his appreciation for the resolution and the kind words of the chairman. He added that it had been his distinct honor to have served under four remarkable chairs — Judges Lloyd D. George, Edward Leavy, Paul Mannes, and Adrian G. Duplantier — and was grateful to the advisory committee for the intellectual stimulation and respect that they had provided to him over the past 12 years.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Niemeyer presented the report of the advisory committee, as set forth in his

memorandum and attachments of May 11, 1999. (Agenda Item 6)

Action Items

Judge Niemeyer reported that the advisory committee was seeking approval of three separate packages of amendments to the civil rules, dealing respectively with: (1) service on federal officers and employees sued in their individual capacity; (2) admiralty rules; and (3) discovery rules.

1. Service Package

FED. R. CIV. P. 4 AND 12

Judge Niemeyer reported that the proposed amendments to Rules 4 and 12 had been initiated at the suggestion of the Department of Justice and adopted by the advisory committee without opposition. He added that the thrust of the amendments was to entitle federal officers and employees who are sued in their individual capacity to the same rights that they would have if sued in an official capacity.

Professor Cooper explained that federal officers and employees are sued in their individual capacity for actions that have some connection to their functions as officers or employees of the United States. He noted that it is common for the United States, through the Department of Justice, to assume the burden of defending them and to move to have the government substituted as the defendant. He said that there was some uncertainty in the case law whether the United States must be served with process, as well as the individual defendant, when an officer or employee is sued for acts in connection with employment.

The amendments to Rule 4 would require service on the United States when a federal employee is sued in an individual capacity for acts occurring in connection with the performance of duties on behalf of the United States. Rule 12 would be amended to provide the same 60-day answer period in an individual-capacity action that the United States enjoys when an officer is sued in an official capacity.

Professor Cooper said that little public comment had been generated by the proposed amendments. The comments received were favorable to the amendments, and several suggested certain drafting improvements, As a result, the advisory committee made improvements in language after publication. For example, as revised, the amendments now use the term "officer or employee" consistently. Language was also added to make sure that no one reads the rule to mean that when the same individual is sued both in an individual capacity and an official capacity, both the individual and the United States must be served twice — once under subparagraph (a) and once under subparagraph (b).

The committee approved the amendments to Rules 4 and 12 without objection.

2. Admiralty Package

Judge Niemeyer reported that the proposed changes in the admiralty rules had been developed over a long period of time with the assistance of a special subcommittee chaired by Mark O. Kasanin, Esquire. He noted that the subcommittee had coordinated its work very closely with the Department of Justice and the Rules Committee of the Maritime Law Association.

Professor Cooper reported that the proposed changes in the Supplemental Rules for Certain Admiralty and Maritime Claims were designed to meet two goals. First, they reflected the increasing importance of civil forfeiture proceedings, which generally use admiralty procedure. The amendments adjust the admiralty rules, for the first time, to make certain necessary procedural distinctions between traditional maritime proceedings and civil forfeiture proceedings. Second, the changes would take account of the 1993 reorganization of FED. R. CIV. P. 4. In addition, the rules have been reorganized and restyled for purposes of clarity.

Professor Cooper stated that it was not necessary to describe the proposed amendments in substantial detail because the advisory committee had presented them to the Standing Committee in January 1998, when it sought authority to publish them for public comment. He noted that there had been little comment or testimony on the proposals and that minor drafting changes had been made by the advisory committee in light of the public comments.

SUPPLEMENTAL ADMIRALTY RULE B

Professor Cooper reported that the advisory committee had made a post-publication adjustment in the language of Rule B(1)(d) — and a companion amendment to Rule (C)(3)(b) — to substitute the passive voice for the active. As published, the amendment had provided that the clerk of court must deliver a summons or other process to the marshal for service if the property in question is a vessel or tangible property aboard a vessel. One of the public comments asserted that delivery of the papers to the clerk for forwarding to the person making service would occasion delay in cases when time is usually of the essence. It was pointed out, for example, that it was the practice in the Eastern District of New York for the clerk to deliver the process to the attorney for the plaintiff, who in turn arranges delivery to the person who will make service. Accordingly, the advisory committee changed the rule to provide broadly that process "must be delivered" to the person making service, without designating who is to effect the delivery. Professor Cooper added that the Maritime Law Association and the Department of Justice agreed with the change, which was made at three places in the amended rules.

Professor Cooper pointed out that FED. R. CIV. P. 4 had been reorganized in 1993. As part of the reorganization, former Rule 4(e) — which is incorporated in the current Admiralty Rule B(1) — has been replaced by Rule 4(n)(2), which permits use of state law to seize a defendant's assets only if personal jurisdiction over the defendant cannot be obtained in the

district where the action is brought. The advisory committee, however, decided not to incorporate Rule 4(n)(2) in the revised Admiralty Rule B because maritime attachment and garnishment are available whenever the defendant is not found within the district, including some circumstances in which personal jurisdiction can also be asserted.

Professor Cooper noted that Rule (B)(1)(e) expressly incorporates FED. R. CIV. P. 64 to make sure that elimination of the reference to state quasi-in-rem jurisdiction in former Rule 4(e) is not read as defeating the continued use of state security devices. Thus, subparagraph (e) reminds attorneys that it is consistent with the admiralty rules to invoke FED. R. CIV. P. 64, which allows the use of security provisions in the manner provided by state law. Professor Cooper said that a concluding sentence would be added to the committee note to Rule E(8) providing that: "if a state law allows a special, limited, or restrictive appearance as an incident to the remedy adopted from state law, the state practice applies through Rule 64 'in the manner provided by' state law."

SUPPLEMENTAL ADMIRALTY RULE C

Professor Cooper explained that the amendments to Rule C were designed in large measure to take into account meaningful distinctions between traditional admiralty and maritime proceedings and civil forfeiture proceedings. In paragraph (2)(c), for example, the complaint in an admiralty or maritime proceeding must state that the property is located within the district or will be within the district while the action is pending. On the other hand, paragraph (2)(d) reflects the variety of civil forfeiture statutes that now allow a court to exercise authority over property outside the district.

Professor Cooper noted that subdivision (6) explicitly provides for different procedures for forfeiture proceedings and admiralty seizure proceedings. In a maritime proceeding, for example, fewer people are entitled to appear and only 10 days are provided to file a verified statement of right or interest. In civil forfeiture proceedings, a person who asserts an interest or right against the property has 20 days to file a statement.

SUPPLEMENTAL ADMIRALTY RULE E

Professor Cooper stated that Rule E(3) provides that maritime attachment and garnishment may be served only within the district. But in forfeiture cases, in rem process may be served outside the district if so authorized by statute. He noted that subdivision E(10) is new and makes clear the authority of the court to preserve and prevent removal of attached or arrested property that remains in the possession of the owner or other person under Rule E(4)(b).

FED. R. CIV. P. 14

Professor Cooper pointed out that the only changes in Rule 14 were to replace the term "the claimant" with "a person who asserts a right under Supplemental Rule C(6)(b)(i)."

The committee approved the amendments to Supplemental Admiralty Rules B, C, and E and FED. R. CIV. P. 14 without objection.

3. Discovery Package

Judge Niemeyer reported that the advisory committee had studied discovery in a comprehensive manner over the past three years. The focus of its efforts was not to curb discovery "abuse" per se, but rather to examine broadly the whole architecture of discovery and to ask whether it can be made more efficient and less expensive — while still preserving the fundamental principle of providing full disclosure of relevant information to the litigants. Yet, he added, full disclosure — especially in the age of information technology — may not require the production of each and every document, regardless of the cost of producing it and the likelihood of its actual use in a case. What needs to be produced, he said, is "all the information that matters."

Judge Niemeyer pointed out that the package of proposed amendments to the civil rules was modest and well balanced. It was designed to make discovery cost less and work better. He said that the advisory committee and its discovery subcommittee would continue to study whether additional changes in the rules should be proposed in the future. He noted, for example, that he believed personally that the committee could explore a number of possibilities for establishing a very inexpensive, streamlined process that would result in prompt resolution of uncomplicated cases.

Judge Niemeyer stated that the impetus for considering changes in the discovery rules had come from several sources. He noted, for example, that the American College of Trial Lawyers and other bar groups had urged that the scope of discovery be narrowed. But, he said, the biggest impetus for change had come from the impact of the Civil Justice Reform Act of 1990 on the district courts. The Act urged each court to experiment locally with various procedural devices in an effort to reduce litigation costs and delay. The 1993 amendments to the Federal Rules of Civil Procedure, enacted in part to facilitate the local experiments sanctioned by the Act, allowed courts to "opt out" of certain provisions of the national rules — most notably the provisions on mandatory disclosure. He added that the combined effect of the Act and the 1993 rules amendments was a "balkanization" of federal pretrial procedure and the proliferation of local rules and procedures.

Judge Niemeyer reported that the advisory committee was firmly committed to returning to a uniform set of national procedural rules. He noted that the bar had been nearly unanimous in urging the committee to limit "opt outs" and local variations. He added, however, that opposition to the rules amendments would likely come from district judges, who are used to their own, carefully developed — and often very effective — local procedures.

Judge Niemeyer described the lengthy and careful process that the advisory committee

had followed in developing the proposed amendments to the discovery rules. He noted that the committee had asked the RAND Corporation to take a fresh look at the enormous data base that it had developed under the Civil Justice Reform Act and to examine particularly the cost of discovery, the satisfaction of attorneys with discovery, and the extent to which discovery is actually used in federal civil cases. In addition, at the committee's request, the Federal Judicial Center polled a scientific cross-section of lawyers and received more than 1,200 responses regarding discovery practice and opinions.

He reported that the advisory committee had received numerous papers from academics on discovery topics. It had conducted two conferences involving judges, lawyers, and law professors, and several of the papers presented at its Boston conference were published in the Boston College Law Review. In addition, the committee sought out and heard the views of practitioners from practically every sector of the legal profession, federal and state judges, law professors, and former rules committee chairs and reporters. He added that he had never witnessed any legislative action or committee action that had involved as much participation, research, input, and support.

Judge Niemeyer reported that the research and input, among other things, had revealed that —

- Discovery accounts for about half of all litigation costs.
- Discovery is actually used in a relatively small percentage of federal civil cases. In 40% of the cases, for example, there is no discovery at all, and in another 25% of the cases, there is only minimal discovery.
- Discovery, however, is used extensively in an important minority of cases. It may cause serious problems in those cases and account for as much as 90% of the litigation costs.
- Both plaintiffs' lawyers and defense lawyers agree by very large margins that discovery costs in general are too high (although they tend to emphasize different factors as the principal reasons for the high costs).
- The bar overwhelmingly supports national uniformity in the rules.
- The bar also overwhelming supports early judicial involvement in discovery, early discovery cut-off dates, and firm trial dates.

Judge Niemeyer stated that the advisory committee had conducted its efforts through a discovery subcommittee chaired by Judge Levi, with the assistance of Professor Marcus as special reporter. He reported that the advisory committee had asked the subcommittee to consider all reasonable proposals for improvement in the discovery process. The subcommittee,

he said, had developed and presented the advisory committee with more than 40 possible recommendations for change. The advisory committee, over the course of several meetings, then debated each of the recommendations. It decided to proceed only with those proposals that commanded the support of a strong majority of the committee members. No measure was approved by a close vote.

Judge Niemeyer stated that the advisory committee then published the package of proposed amendments, conducted three public hearings, heard from more than 70 witnesses, and received more than 300 written comments. The committee concluded that the comments, while very informative and helpful, generally addressed the same policy issues and concerns that had been considered thoroughly before publication. Accordingly, the changes made by the committee following publication consisted of language and organizational improvements, rather than substantive changes. The committee, however, amended proposed Rule 30(f)(1) in light of the public comments to delete the requirement that the deponent consent to extending a deposition beyond one day.

Judge Niemeyer reported that three issues in the package had caused the greatest debate during the public comment period and the committee's deliberations: (1) mandatory initial disclosures under Rule 26(a)(1); (2) the scope of discovery under Rule 26(b)(1); and (3) cost bearing under Rule 26(b)(2).

1. Mandatory Initial Disclosures. Judge Niemeyer pointed out that the 1993 rule amendments, which had introduced mandatory initial disclosures, were very controversial. They had generated three dissents on the Supreme Court and came close to being rejected by the Congress. He noted that lawyers had complained strenuously that the revised Rule 26(a)(1) invades the attorney-client relationship by requiring the production of hostile documents and turning over to opposing parties documents that have not been asked for.

Nevertheless, he said, mandatory disclosure has worked well in the districts that have adopted it, and it has been used substantially even in many of the districts that have officially opted out of the national disclosure rule. The empirical data show general satisfaction with disclosure, but they are not conclusive on whether it reduces costs.

Judge Niemeyer explained that the advisory committee was committed to the principle of a single, uniform national rule, without local "opt outs." It therefore had three options: (a) to reject mandatory disclosure altogether; (b) to extend the existing mandatory disclosure regime to all districts; or (c) to mandate disclosure, but in a modified, less controversial form. He stated that the advisory committee decided upon the third course — requiring parties to disclose only that information that the disclosing party may use to support its own claims or defenses.

Judge Niemeyer pointed out that most of the criticisms that the advisory committee had received about disclosure were that it would not work in certain kinds of cases. In response, the rule was amended to exclude certain categories of cases from the disclosure requirement. It also

allows the attorneys to opt out of disclosure in individual cases. And the rule provides district judges with considerable discretion to dispense with disclosure in individual cases.

2. Scope of Discovery. Judge Niemeyer noted that the committee's proposed amendment to Rule 26(b)(1) would not narrow the scope of discovery. Rather, it would divide discovery into two distinct phases: (1) attorney-managed discovery, generally conducted without court involvement and embracing matters relevant to the claim or defense of any party; and (2) court-managed discovery, embracing — with court approval — any matter relevant to the subject matter involved in the action.

He said that opponents of the change had argued that the proposed amendment would cause substantial litigation regarding the scope of discovery. He agreed that some litigation would in fact occur initially, but the law would soon become clear.

3. Cost bearing. Judge Niemeyer stated that much of the opposition to the proposed amendment to Rule 26(b)(2) had been expressed in terms that it would favor rich litigants at the expense of poor ones. He explained that the present rules give a judge implicit authority to allow a party to obtain discovery that may be burdensome or duplicative, on the condition that the requesting party pay for it. The amended rule, he said, would make that authority explicit, and it would tell judges clearly that they have the tools they need to manage and regulate discovery.

FED. R. CIV. P. 5

Judge Niemeyer explained that the advisory committee had originally proposed — when it sought authority from the Standing Committee to publish the proposed discovery amendments — that Rule 5(d) be amended to provide that discovery and disclosure materials "need not" be filed with the court until they are used in a proceeding. The Standing Committee, however, voted to change "need not" to "must not." Judge Niemeyer said that the rule had attracted very little public comment, and the advisory committee on reflection agreed with the Standing Committee that "must not" is preferable language to "need not."

One of the members argued that discovery material not filed with the court should nevertheless be considered part of the court record. He recommended adding a sentence to that effect in the committee note in order to protect the press and the public. He explained, for example, that these materials, having the status of court records, would be privileged. Therefore, one who published them would be protected in the event of a defamation action. Another member agreed and added that if the materials were court records, they would also be available for public examination. He said that it was important to clarify the status of unfiled discovery materials, and the status should be specified in the rule itself, rather than the committee note.

Judge Niemeyer responded that the advisory committee had not studied this issue. Rather, its principal purpose in amending Rule 5 was to alleviate the storage burdens and costs imposed on clerks' offices. Judge Levi added that the advisory committee also considered the

amendment necessary to bring the national rule on filing into conformity with most of the present local rules and practices on the subject.

Professor Marcus pointed out that he had conducted considerable research on whether unfiled materials are "court records" and had concluded that it is a very complicated matter that cannot be addressed properly by simply adding a sentence to the committee note. Several other participants agreed with his analysis.

Professor Hazard recommended that the advisory committee undertake a study of whether discovery and disclosure materials are, or should be, part of the court record. **Mr. Lafitte moved to have the advisory committee study the issue and report back at the January 2000 meeting of the Standing Committee. The committee approved the motion by consensus without a formal vote.**

The committee approved the amendment to Rule 5 without objection.

FED. R. CIV. P. 26(a)

Judge Levi said that the Rules Enabling Act contemplates a set of national, uniform procedural rules to accompany national substantive law. He noted that the Judicial Conference, in its 1997 final report to Congress on the Civil Justice Reform Act, had asked the rules committees specifically to consider whether the advantages of national uniformity outweigh the advantages of allowing courts to develop their own local alternative procedures in such areas as initial disclosure and the development of discovery plans.

Judge Levi reported that well over half the district courts have some form of disclosure in place. Research conducted for the committee by the Federal Judicial Center, moreover, disclosed that some sort of disclosure had occurred in three-fifths of the federal cases surveyed. The Center study also showed that most of the 1,200 attorneys interviewed who had used disclosure liked it and said that it helps to reduce disputes, enhance settlements, and expedite cases. Judge Levi said that the Center study had confirmed that cases where disclosure occurs are concluded more quickly than cases without disclosure, and the RAND study came close to saying that attorney hours are reduced when there is disclosure. He added that the Federal Judicial Center had also found that a majority of the lawyers believe that the lack of procedural uniformity among districts causes problems for attorneys.

Judge Levi reported that the discovery subcommittee had been working on discovery for three years, had conducted several conferences with the bar, and had consulted with six major bar organizations. It had heard from both plaintiffs' attorneys and defense attorneys that national procedural uniformity was very important to them. Members of the bar, he said, report that it is difficult to keep up with changes in local rules, and the practical effect of the local rules is to create a preference for local counsel. Judge Levi added that although many of the rules are posted on the Internet, they are not easy to find. Electronic postings, moreover, do not include

standing orders and local interpretations of the local rules.

Judge Levi emphasized that national uniformity was a major matter. He noted that it had been a common theme voiced by the lawyers at the subcommittee's Boston College conference. In fact, he said, it was a fundamental premise of the federal rules and the Rules Enabling Act. Discovery and disclosure, he emphasized, are an important part of the pretrial process and should not be handled by different sets of rules determined by geography. Discovery and disclosure can affect notice pleading, motions to dismiss, and motions for summary judgment, and they may in certain instances affect the outcome of cases.

Judge Levi said that the subcommittee, in seeking national uniformity, had three options before it. The first was to retain the present disclosure requirements of Rule 26(a)(1), but to eliminate the authority of courts to opt out of the requirements. The second option was to eliminate disclosure entirely from the national rule, effectively preventing any court from using it. He noted that this approach would be very controversial because many courts now require disclosure and have achieved substantial benefits from it. The third choice — which the subcommittee adopted — was to retain disclosure as a national requirement, but to remove the "heartburn" from it by removing the present requirement that attorneys disclose information harmful to their clients without a formal discovery request.

Under the subcommittee's proposal, which the advisory committee eventually approved, parties would only have to disclose matters that support their own claims. Complex, or "high end," cases will be effectively removed from the rule by action of counsel, and eight categories of "low end" cases are explicitly exempted from the rule. The lawyers, moreover, may mutually opt out of the present disclosure requirements, and the court has discretion to dispense with disclosure in any case.

Judge Levi said that the proposal was moderate and based on fundamental fairness. He noted that it was similar to FED. R. CRIM. P. 16 in criminal cases, under which the government turns over documents that it intends to use at trial. Moreover, he said, it was similar to FED. R. CIV. P. 26(a)(3), which deals with documents and witnesses that parties intend to use at trial. He added that the bar, with some notable exceptions, supports the proposal. He noted that the Litigation Section of the American Bar Association, which had been adamantly opposed to Rule 26(a)(1) in 1993, supported the present proposal. In addition, endorsements had been received from the American College of Trial Lawyers and the Federal Magistrate Judges Association.

Judge Levi reported that many letters had been received from judges during the public comment period opposing any national rule that would impose mandatory disclosure in their districts or prescribe a form of disclosure different from that currently provided in their own local rules. The judges in the Eastern District of Virginia, in particular, expressed concern that the amendments would slow down the "rocket docket" used in that court. In response, the advisory committee added a sentence to Rule 26(f) after publication authorizing a court by local rule to shorten the prescribed period between the Rule 26(f) attorney conference and the court's Rule

16(b) scheduling conference or order.

Judge Levi noted that 10 different federal judges had worked in the advisory committee on the discovery package over the past three years, and all 10 agree that the proposed Rule 26(a)(1) would both achieve national uniformity and benefit civil litigation. He emphasized that the rule provides judges with considerable discretion, but within the context of an overall national rule.

Mr. Schreiber argued against weakening the present mandatory disclosure requirements. He said that hostile information is the key to all discovery and that parties should be required to disclose pertinent information hostile to their clients' interests. He added that the language of the proposed amendment — requiring disclosure of matters "that the disclosing party may use to support its claims" — was meaningless. He said that a party could simply argue at the initial stages of the case that it simply has not yet made up its mind as to whether it will use any particular material in the case.

Mr. Schreiber moved to substitute the word "will" for the word "may." Thus, the amendment would require a party to disclose matters that it "will use to support its claims." Judge Tashima recommended an amendment to the motion to substitute the words "supports its claims or defenses." Judge Tashima said that the term "supports it claims or defenses" will lead to less gamesmanship among attorneys than "may use to support its claims or defenses" **Mr. Schreiber accepted the amendment to his motion.**

Judge Levi responded that the advisory committee had considered both formulations at considerable length. He noted that the agenda binder included a memorandum in which Professors Cooper and Marcus — who had different personal preferences regarding the appropriate terminology — describe the respective advantages and disadvantages of "may use to support" vis a vis "supporting." At Judge Levi's request, each of them presented his respective views orally to the committee.

Judge Levi stated that the advisory committee ultimately concluded that "may use to support" would be easier for lawyers to apply. It also has the advantage of generally tracking the language of Rule 26(a)(3), dealing with pretrial disclosures. In any event, he said, the court has authority to impose appropriate sanctions to prevent gamesmanship on the part of attorneys

The members discussed the merits of the two alternatives, how they compared to similar language in other parts of the Federal Rules of Civil Procedure (including Rule 11), and how lawyers and judges might apply them in practical situations.

The committee rejected Mr. Schreiber's motion by a vote of 8 to 3

Judge Tashima moved to amend Rule 26(a)(1) to allow a court by local rule either: (1) to opt out completely from its mandatory disclosure requirement; or (2) to narrow the

categories of disclosure materials.

Some of the members expressed opposition to the motion on the grounds that it would undercut the goal of national uniformity. One member added that if the local bar does not need or want disclosure, the parties will mutually stipulate out of it.

The committee rejected Judge Tashima's motion by a vote of 11 to 1.

Judge Tashima moved to delete from the fifth paragraph of the committee note the sentence reading, "Clients can be bewildered by the conflicting obligations they face when sued in different districts." Professor Cooper agreed that the sentence was not essential. **The committee decided without objection to eliminate the sentence.**

Judge Wilson moved to repeal the 1993 amendments entirely and return to the pre-1993 procedures. He said that the single most important procedural requirement is to encourage judges to resolve disputes decisively and quickly. He added that if a judge is readily accessible to decide disputes, the disputes will arise less frequently and cases will be resolved promptly. He said that judges should also establish early cut-off dates for discovery and set early and firm trial dates.

Judge Levi responded that the 1993 rules authorized mandatory disclosure, and its repeal would deprive courts of the benefits derived from disclosure, as demonstrated by attorney surveys and other empirical data. He said that the present Rule 26(a)(1) proposal was very modest and was necessary to provide the district courts with continuing authority to require disclosure.

Associate Attorney General Fisher stated that the Department of Justice very much favors a uniform set of national procedural rules, although different parts of the Department may have different views as to specific parts of the proposed rules amendments. He said that the central concept of judge-managed discovery will work if the judges actually make it work by being readily accessible to resolve discovery problems.

Mr. Fisher added that Department attorneys, based on their experience, had identified several other categories of cases that should be exempted from the initial disclosure requirements of Rule 26(a)(1). As examples, he listed forfeiture cases, mandamus cases, FOIA cases, constitutional challenges to statutes, *Bivens* cases, and social security cases. He noted that the advisory committee was not inclined to expand the list at this point, but had promised to consider these suggestions promptly. One of the members responded that the list of exemptions was too long already and that it is generally not sound policy to encourage different procedural rules for different categories of cases. Mr. Fisher responded that the Department supported Rule 26(a)(1), as amended.

The committee rejected Judge Wilson's motion by a vote of 8 to 4.

The committee then approved the proposed amendments to Rule 26(a) by a vote of 11 to 1.

FED. R. CIV. P. 26(b)(1)

Judge Levi stated that the proposed amendment to Rule 26(b)(1) will not change the scope of discovery. He said that it will not keep litigants from obtaining appropriate discovery in any case. Parties will still be entitled — on request and without court approval — to a very broad range of information, *i.e.*, "any matter . . . relevant to the claim or defense of any party." The change occasioned by the amendment is to assign a portion of the discovery to the courts to manage, as judges for cause may make available "any matter relevant to the subject matter involved in an action."

Judge Levi said that the language of the amended rule is clearer than that of the present rule, which provides insufficient guidelines for limiting overbroad discovery. The district judges and magistrate judges who had reviewed the amendment believe that it will work well. In fact, he said, not a single judge had written or testified against the amendment. He noted that the proposal was supported by the American College of Trial Lawyers, the Litigation Section of the American Bar Association, and the Federal Magistrate Judges Association.

Judge Levi pointed out that the Department of Justice under the Carter Administration had urged the advisory committee to narrow the scope of discovery by removing the "subject matter" criterion. He read from a letter from Attorney General Griffin Bell to Judge Roszel Thomsen, chairman of the Standing Committee, in which the Attorney General reported that he "was particularly pleased with the . . . proposed change in Rule 26 which would narrow the scope of discovery to the 'issues raised.' It has been my experience as a judge, practicing lawyer and now as Attorney General that the scope of discovery is far too broad and that excessive discovery has significantly contributed to the delays, complexity, and high cost of civil litigation in the federal courts."

Judge Levi said, however, that the Department of Justice had submitted a memorandum to the committee opposing the proposed amendment, stating that it would have a deleterious effect on the Department's litigation and on civil cases generally.

Mr. Fisher pointed out that the Department of Justice sues on behalf of the public interest, and its career litigators have sincere objections to the proposed amendment, as do the American Trial Lawyers Association and civil rights and environmental organizations. In short, he said, Department lawyers are satisfied with the existing standards and believe that they work very well. The burden, presently, is placed on the defendant to come forward to limit discovery when it is seen as inappropriate or excessive. For the most part, judges do not intervene in the discovery process, and, as a consequence, a broad range of discovery is routinely provided today. The Department believes, however, that the amended rule will shift the burden to plaintiffs and

require them to seek judicial intervention to obtain information that they now receive regularly. He added that government attorneys fear that most judges simply will not have the time or inclination to become involved in discovery matters. They fear, moreover, that judges, individually and collectively, will construe the revised language of Rule 26(b)(1) narrowly and deny discovery on the merits. The net result, thus, will be a narrowing of the scope of discovery.

Mr. Fisher said that the amendment will cause particular problems in civil rights and environmental cases, and the public interests of the United States will not be served. He noted that defendants in these cases often resist producing essential records and information. He said that the Department lawyers, and plaintiffs' lawyers generally, believe that they will face even greater resistance under the amended rule.

Mr. Fisher concluded that the problems that the advisory committee attempted to address through the proposed amendment are important and difficult ones. He expressed the Department's appreciation for the committee's careful and thoughtful work. But, he added, the amendment simply was not needed. He suggested that the principal argument advanced in support of the change is that judges do not take appropriate steps under the current rule to limit the excessive discovery that occurs in some cases. But, he said, the current rule clearly gives judges sufficient authority to take an active role and limit inappropriate discovery requests.

He noted that the Department of Justice believed that there would be a good deal of costly litigation over the meaning of the amendment, at least for a while. There may well be inconsistent interpretations of the new rule, and, as a result, the scope of discovery will effectively be narrowed for some plaintiffs. In short, he said, the proposed amendment attempts to deal with a small group of troublesome cases, but will result in serious negative consequences. He suggested that, rather than recreating the whole landscape of Rule 26(b), the advisory committee should consider removing those troublesome cases from the general operation of the rule and regulating them with special rules.

Judge Niemeyer thanked Mr. Fisher and said that his points were very well taken. But, he said, the advisory committee had considered the same points at great length both before and during the public comment period. He noted that some members of the advisory committee agreed generally with Mr. Fisher's arguments, but a strong majority of the committee supported the proposed amendment. He noted that the advisory committee included in its report to the Standing Committee an April 14, 1999 "dissenting opinion" prepared by Professor Thomas D. Rowe, Jr., a member of the advisory committee.

Judge Levi added that the current law makes almost everything relevant to the claims or defenses in civil rights and environmental cases. The amendment, he said, would not limit the broad array of information that plaintiffs presently receive through discovery. They will, for example, still be entitled under the amended rule to information about the treatment of other employees, a pattern of discrimination, or a continuing violation, as well as information extending beyond the statute of limitations. These types of information are all considered

relevant to the claims and defenses under current law.

Judge Levi noted that the advisory committee disagreed that the proposed amendment would lead to costly motion practice. He emphasized that discovery disputes are usually decided on an expedited basis. In many courts they are resolved without the filing of written motions, and often by telephone. He added that discovery works well in most cases and will continue to work well under the proposed amendment. But there is a group of cases where it is very contentious and very expensive. He said that the courts need to take an active role in managing these cases, and the amended rule gives judges clear authority and direction to manage them.

Judge Niemeyer said that the discovery rules are designed generally for lawyers and litigants who do not abuse the process. They assume compliance and good faith for the most part. The existing rules, as well as the proposed amendments, expect judges to supervise discovery in those cases where there are problems. Thus, if a defendant "stonewalls" on discovery production in a case, plaintiffs' counsel or the Department of Justice, will have to litigate on the scope of discovery in any event — either under the present rule or the amended rule.

One of the members strongly opposed the proposed amendment to Rule 26(b)(1), calling it — along with the proposed cost-bearing amendment to Rule 26(b)(2) — the most radical change in the civil rules in 60 years. He said that every employment law group and civil rights organization was opposed to the change, because it would limit discovery and strongly tilt the playing field against them. Another member, however, responded that he could not think of a single piece of information obtainable under the current rule that would not be discovered under the new rule. Other members added that they supported the amendment because it would cause lawyers to focus their discovery efforts more effectively and require them to be more specific and responsible in what they request.

Mr. Schreiber questioned why the advisory committee had used the term "for good cause shown," instead of "on motion" or "for reasonable cause." He moved to delete "for good cause shown" and substitute the words "on motion." Thus, judges would have complete discretion to order broader discovery, without being bound to the "good cause" standard.

Judge Levi replied that the committee note states specifically that the good-cause standard is meant to be flexible. One of the members added that the rule had to prescribe a standard beyond that of mere discretion. Another member reminded the committee that "good cause" had been the standard required for the production of discovery documents before 1970.

Mr. Schreiber later withdrew his motion.

The committee approved the amendment to Rule 26(b)(1) by a vote of 10 to 2.

FED. R. CIV. P. 26(b)(2)

Judge Niemeyer noted that the proposed amendment to Rule 26(b)(2), governing cost bearing, had been published as an amendment to Rule 34. The advisory committee relocated it in Rule 26 after publication, but without any change in content. He said that its placement in Rule 26 would emphasize that it applies to all categories of discovery. He added that the proposed amendment would not change the law as it exists, but would make an existing judicial tool explicit. It would give district judges and magistrate judges clear authority to require a party seeking information not otherwise discoverable under Rule 26(b)(2)(i), (ii), or (iii) to pay part or all of the reasonable expenses incurred in its production.

Mr. Fisher stated that the Department of Justice was concerned that the proposed amendment might be applied by the courts to require requesting parties to pay for "court-managed" discovery, vis a vis "attorney-managed" discovery. He recommended inclusion of a clear statement that discovery of "any matter relevant to the subject matter involved in the action" would be provided without charge to the requesting party, in the same manner as discovery of "any matter . . . relevant to the claim or defense of any party." In other words, the cost-bearing provision explicitly would be applicable to both.

Judge Niemeyer responded that the proposed amendment did in fact apply equally to both and said that he would be pleased to work on improving the language. Mr. Fisher suggested including in the committee note to Rule 26(b)(1) language from page 74 of the agenda book declaring that the scope-expansion and cost-bearing provisions are not intended to operate in tandem and that ordinarily a request to expand the scope of discovery will not justify a cost-bearing order. Judge Niemeyer agreed to draft appropriate language to that effect, and his language was later incorporated in the revised committee note.

Judge Scirica stated that several public comments had suggested that the amendment would have the effect of distinguishing between plaintiffs who have resources and those who do not. Judge Niemeyer replied that the amendment would not change the current results. Plaintiffs will continue to receive, without charge, every document that relates to their claim or defense or that relates to the subject matter of the action. Cost-bearing will only be applied to discovery requests that are burdensome, duplicative, or unreasonable. Judge Levi added that a judge, in considering cost bearing, is required explicitly to take account of the parties' resources under Rule 26(b)(2). Accordingly, parties with limited resources may actually be treated better than well-healed parties under the amended rule. Moreover, a party who can afford to pay for marginal discovery, and is willing to pay for it, may not in fact receive it because the judge has discretion to deny the request entirely.

One of the members said that the amendment would cause havoc, especially in employment discrimination cases. He predicted that defendants would bring a motion for cost-bearing in every case in an effort to save money for their clients. One of the members responded that the prediction assumed that judges would act foolishly. He said that routinely-made motions

will be routinely denied.

Judge Levi added that the cost-bearing amendment, by definition, deals only with material that is marginal to the case and is burdensome, duplicative, or unreasonable. Some members questioned why that type of material should be produced at all. Others responded that the amendment provides judges with a useful management tool and would permit a judge to determine how much a lawyer wants particular material and whether the lawyer is willing to pay for it. Others suggested that the amendment would allow judges to order discovery on condition that the requesting party pay only part of the cost of producing it. They said that it was not clear whether judges may apportion costs under the current rule.

One member asked why local rule authority had been removed from the provision of Rule 26(b)(2) dealing with the number of depositions and interrogatories and the length of depositions, but retained with regard to the number of requests for admissions. Professor Cooper responded that there were several local rules on the subject, and the advisory committee was reluctant to eliminate local rule authority to limit requests for admission without further study of local practices.

Another member pointed out that the committee note to Rule 26 referred to standing orders, as well as local rules, in some places, but not in others. He suggested that the note be reviewed in this respect for consistency of terminology.

The committee approved the proposed amendment to Rule 26(b)(2) by a vote of 11 to 1.

FED. R. CIV. P. 26(d) and (f)

Judge Niemeyer reported that the proposed amendments to Rule 26(f) would require the parties to confer at least 21 days, rather than 14 days, before the court's Rule 16 scheduling conference or scheduling order. He noted that the advisory committee had made a change in the amendments after publication to accommodate the expedited pretrial procedures used in the Eastern District of Virginia. The change would allow a court by local rule to require that the conference be held less than 21 days before the scheduling conference or order.

Judge Niemeyer pointed out that the amendments would no longer require the attorneys to meet face-to-face, but would allow a court by local rule or order to require that the attorneys attend the conference in person. Several members questioned the wisdom of allowing courts to issue local rules on this subject, especially since the authority of courts to opt out of national requirements was being eliminated in other parts of Rule 26. One added that the requirement for face-to-face meetings should be made in individual cases, rather than by local rule.

Judges Niemeyer and Levi agreed that local rules should be discouraged generally, but they noted that the advisory committee believed that differences in geography and local culture

made it appropriate to allow courts to have local variations in this specific instance. They added that several commentators had informed the committee that face-to-face meetings between the attorneys, as required by the 1993 amendments to Rule 26(f), had been instrumental in expediting cases and reducing costs.

One of the members stated that a court should not be allowed by local rule to require out-of-town counsel to appear in person. Professor Cooper replied that the committee note addressed the issue and provided that, "a local rule might wisely mandate face-to-face meetings only when the parties or lawyers are in sufficient proximity to one another."

Judge Kravitch moved to eliminate from the proposed amendments the authority of a court to require face-to-face meetings of counsel by local rule and replace it with language that would authorize a court to require that meetings be held face-to-face, but only by a judge's case-specific order. Her motion was approved by a vote of 8 to 2.

The committee approved the amendments to Rules 26(d) and (f) by a vote of 12 to 0.

FED. R. CIV. P. 30

Judge Niemeyer reported that the proposed amendment to Rule 30(d)(2) would establish a presumptive limit on depositions of one day of seven hours. But a longer period could be authorized by court order or stipulation of the parties. The amendment, he said, was designed to respond to an area cited by commentators — particularly plaintiffs' lawyers — as one of recurring abuse and excess cost. He noted that research by the Federal Judicial Center had demonstrated that depositions are often the single most expensive item of discovery.

Judge Niemeyer stated that the rule provides a norm to guide the bench and bar in measuring depositions. He said that the advisory committee had heard many comments at the public hearings that the new rule would be effective. He added that the most common response from lawyers was that they have little trouble in reaching accommodations with opposing counsel on making arrangements for depositions. The amendment, he said, tells lawyers what the norm is for a deposition, and they will plan their depositions accordingly. One member added that he had been strongly opposed to the amendment when it had been published, but the consistent testimony from lawyers at the hearings had convinced him that the rule would work well in practice.

Judge Tashima moved to exclude expert witnesses from the operation of the rule. He noted that many expert witness depositions simply cannot be completed within seven hours. He added that the Department of Justice supported his position in this regard, but the Department would go further and also exclude Rule 30(b)(6) witnesses and named parties.

One of the members spoke against the proposed amendment in general, saying that it simply was not necessary. He said that it is easier to demonstrate to a judge that abuse has

occurred in a deposition than to convince the judge that additional time is needed for a deposition. Judge Niemeyer replied that many members of the advisory committee had been of the same view, but were convinced by the hearings that the amendment to the rule would be beneficial.

Professor Marcus said that the advisory committee had included additional language in the committee note to guide lawyers and judges as to when it would be desirable to extend the time for the deposition. Mr. Katyal added that the Department of Justice appreciated the additional language in the committee note, but still believed that there was no need to apply the presumptive time limit to depositions of expert witnesses. He said that government attorneys feared that relying on the consent of a party or the court's management to waive the 7-hour limit would not be sufficient.

The committee rejected Judge Tashima's motion by a vote of 7 to 3.

One member said that it was essential that the deponent be required to read pertinent documents in advance in order to avoid wasting time and generating requests for extensions of time. He noted that language to that effect had been included in the committee note, but he would prefer to have a clear requirement included in the rule. He also suggested that the note provide additional direction to the bar regarding time limits for depositions in multiple-party cases. Judge Niemeyer responded that the discovery subcommittee would continue to study these matters, but it is simply not possible to address all potential problems in the rule or the note.

Judge Niemeyer reported that the advisory committee had amended Rule 30(f)(1), without publication, to eliminate the need to file a deposition with the court. The change merely conforms the rule to the published amendment to Rule 5(d), which provides that depositions not be filed with the court.

The committee approved the proposed amendments to Rule 30 by a vote of 10 to 1.

FED. R. CIV. P. 34

Judge Niemeyer reported that the advisory committee had added to Rule 34 a cross-reference to Rule 26(b)(2)(i), (ii), and (iii). He noted that, as published, the cost-bearing provision had been included as part of Rule 34(b), but the committee relocated it to Rule 26(b)(2) after publication. Because cost-bearing concerns often arise in connection with discovery under Rule 34, a reference was needed in Rule 34 to call attention to the availability of cost-bearing in connection with motions to compel Rule 34 discovery and Rule 26(c) protective orders in connection with document discovery.

Some members of the committee questioned the need for the cross-reference in Rule 34. Other members pointed out, however, that although the reference is not essential, it serves as a

helpful flag to lawyers.

The committee approved the proposed amendment to Rule 34 without objection.

FED. R. CIV. P. 37

Judge Niemeyer reported that the proposed amendment to Rule 37(c)(1) closes a gap in the current rule and provides that the sanction of exclusion, forbidding the use of materials not properly disclosed, applies to a failure to supplement a formal discovery response.

The committee approved the proposed amendment to Rule 37 without objection.

The committee approved the package of amendments to the discovery rules by a vote of 10 to 0.

Rules for Publication

Electronic Service

FED. R. CIV. P. 5, 6, and 77 and FED. R. BANKR. P. 9006 and 9022

Judge Niemeyer reported that the Advisory Committee on Civil Rules had been asked to take the lead in drafting uniform amendments to the federal rules to authorize service by electronic means. The advisory committee, he said, had worked closely with the Standing Committee's Technology Subcommittee (which includes representatives from each of the advisory committees), and it had generally followed the advice of that subcommittee. He noted that the proposed amendments before the Standing Committee had been circulated to the other advisory committees for comment. Although many of the suggestions from the other committees had been incorporated in the draft, the advisory committees were not in complete agreement on all parts of the draft.

Professor Cooper pointed out that all the participants agreed that the time for electronic service had arrived, but they also agreed that it was premature to consider making its use mandatory — either by national rule or by local rule. Accordingly, the proposed amendments authorize electronic service with the consent of the party being served. He added that they authorize electronic service only for documents under Rules 5(a) and 77(d), and not for the service of initiating documents and process in a case, such as under FED. R. CIV. P. 4

Professor Cooper said that, as amended, Rule 5(b) specifies that service is complete upon "transmission." He noted that the Advisory Committee on Civil Rules had requested specific comment from the other advisory committees on this point. In response, the Advisory Committee on Appellate Rules asked what should happen if service is transmitted electronically, but the electronic system notifies the sender that the message has not in fact been delivered. As a

result, language was added to the committee note specifying that: "As with other modes of service, . . . actual notice that the transmission was not received defeats the presumption of receipt that arises from the provision that service is complete upon transmission."

Professor Cooper pointed out that new subparagraph 5(b)(2)(D) provides that, if authorized by local rule, a party may make service through the court's transmission facilities. He explained that this provision contemplates eventual enhancements in the courts' electronic systems to allow a party to file a paper with the court and have it served simultaneously on all the required parties. Professor Cooper also pointed out that this is the only reference to local rule authority in the proposed amendments. In addition, a minor amendment would be made to FED. R. CIV. P. 77(d) to conform to the changes proposed in Rule 5(b).

Judge Niemeyer reported that electronic service raises the question of whether the party being served should be allowed additional time to respond, in the same way that FED. R. CIV. P. 6(e) currently provides an additional three days to respond when a party is served by mail. He said that differing views had been expressed on this subject. Accordingly, the Advisory Committee on Civil Rules had prepared a draft rule plus three alternatives for presentation to the Standing Committee. The draft rule would allow an extra three days for all service other than personal service. Alternative 1 would make no change in Rule 6(e), therefore providing no additional time when service is made electronically. Alternative 2 would eliminate Rule 6(e) and the three-day provision entirely. Alternative 3 would amend Rule 6(e) to allow an additional three days if service is made by mail "or by a means permitted only with the consent of the party served." Professor Resnick said that this formulation, which covers electronic service, could conveniently be incorporated by the Federal Rules of Bankruptcy Procedure.

Judge Niemeyer reported that 6 members of the Advisory Committee on Civil Rules had voted against allowing additional time for service by electronic means — or for any other types of proposed consensual service, such as commercial carrier. Professor Cooper added that the reasoning for this approach is that the rule specifically requires consent, and people will only consent to a type of service in which they have confidence. Accordingly, there is no need to provide them with additional time. He added that the Advisory Committee on Appellate Rules had expressed concern that if additional time were given, it would deter people from using electronic service.

Judge Niemeyer said that 4 members of the advisory committee had voted to allow three days additional time. He noted that those who favored allowing additional time urged that consent will be more likely to be given if it brings with it the reward of additional time. He added that the committee would describe the alternatives and solicit comment from the public on the advisability of applying the three-day rule to electronic service.

Judge Scirica emphasized the importance of publishing a uniform set of amendments if feasible. Professor Cooper agreed, but pointed out some practical differences between civil and appellate practice. Judge Garwood added that the Federal Rules of Appellate Procedure —

unlike the Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure — presently authorize service by commercial carrier, and that no consent is required from the party being served by commercial carrier. He noted that FED. R. APP. P. 25 and 26 give the party being served an extra three days unless the paper in question is delivered on the date of service specified in the paper.

Judge Garwood said that the time periods should generally be the same in all the federal rules. He would, however, distinguish the issue of the authority to use commercial carriers from the issue of whether an additional three days is provided for a response.

Professor Resnick said that the bankruptcy rules did not have to be amended to authorize electronic service in adversary proceedings because FED. R. CIV. P. 5 is applicable to those proceedings. He added that the Advisory Committee on Bankruptcy Rules believed that an additional three days should be allowed for electronic service, and for all other types of service except personal delivery. Therefore, it had prepared companion amendments to FED. R. BANKR. P. 9006, to extend the three-day "mail rule" to all service under FED. R. CIV. P. 5(b)(2)(C) and (D), and to FED. R. BANKR. P. 9022, to conform to the proposed amendment to FED. R. CIV. P. 77(d). He urged that the proposed amendments to the bankruptcy rules be published together with the proposed amendments to the civil rules.

The committee voted without objection to authorize publication of the proposed amendments to FED. R. CIV. P. 5(b) and 77(d) and to FED. R. BANKR. P. 9006 and 9022. As part of the package, an alternate amendment to FED. R. CIV. P. 6(e) would also be published for comment.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Davis presented the report of the advisory committee, as set forth in his memorandum and attachments of May 12, 1999. (Agenda Item 8)

He reported that the advisory committee had no action items to present. He noted that the committee was deeply involved in the project to restyle the body of criminal rules. The Style Subcommittee of the Standing Committee had prepared a draft of the entire criminal rules, and the advisory committee was close to completing its revision of the first 22 rules.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith presented the report of the advisory committee, as set forth in her memorandum and attachments of May 1, 1999. (Agenda Item 9)

Judge Smith reported that the advisory committee was seeking approval of amendments

to seven rules. She noted that she had provided the Standing Committee with a detailed explanation of the proposed amendments at the January 1999 meeting. The advisory committee, she said, had conducted two hearings on the amendments and had received 173 written comments from the public.

FED. R. EVID. 103

Judge Smith said that the proposed amendment to Rule 103 would resolve a dispute in the case law over whether it is necessary for a party to renew an objection or an offer proof at trial after the court has made an advance ruling on the admissibility of the proffered evidence. She noted that the amendment had been considered by the Standing Committee on several occasions and that improvements in its language had been made. She added that the current proposal had received very favorable support during the public comment period.

Judge Smith pointed out that the proposed amendment, as published, had contained an additional sentence codifying and extending to all cases the principles of *Luce v. United States,* 469 U.S. 38 (1984). In that case, the Supreme Court held that a criminal defendant must testify at trial in order to preserve the right to appeal an advance ruling admitting impeachment evidence. The public comments on the addition, she said, had been negative, and several commentators had expressed concern over the potential and unpredictable consequences of applying *Luce* to civil cases.

Judge Smith said that the advisory committee had decided to eliminate the additional sentence in light of the public comments. But, she added, some members were concerned that elimination of the sentence might be interpreted as an implicit attempt to overrule *Luce.* Ultimately, the advisory committee decided to eliminate the sentence but to include explicit language in the committee note stating that nothing in the amendment is intended to affect the rule set forth in *Luce.*

The committee approved the proposed amendment to Rule 103 without objection.

FED. R. EVID. 404

Judge Smith reported that Rule 404(a)(1) would be amended to provide that when an accused attacks the character of an alleged victim, the accused's character also becomes subject to attack for the "same trait." She pointed out that the amendment, as published, had been broader in scope, allowing the accused to be attacked by evidence of a "pertinent trait of character." She added that the advisory committee had narrowed the amendment in light of negative public comments and comments from some members of the Standing Committee.

The committee approved the proposed amendment to Rule 404 without objection.

FED. R. EVID. 701

Mr. Holder reported that the litigating divisions of the Department of Justice, the United States attorneys, and other components of the Department had thoroughly reviewed the proposed amendment to FED. R. EVID. 701 and had concluded that it would have a serious and deleterious impact on the Department's civil and criminal litigation. He said that he was grateful that the advisory committee had carefully considered his letter of January 5, 1999, to Judge Smith and had made changes in the amended rule and the accompanying committee note to accommodate the Department's concerns. But, he said, the revised amendments regrettably did not alleviate the core concerns of the Department's lawyers.

Mr. Holder explained that no bright line is presently drawn in Rule 701 between lay testimony and expert testimony. Witnesses are often put on the stand by counsel to testify as to facts, but their testimony inevitably includes opinions based on their occupation or personal experience.

He noted, for example, that the Department of Justice puts witnesses on the stand who testify as to drug transactions, food adulteration, or environmental cleanups. Many of these witnesses would not be considered "experts," in the common or legal use of the term, but their testimony is often based on specialized knowledge. The testimony cannot meaningfully be presented to the court or jury without the witnesses giving their opinions, which are based on specialized knowledge arising from their occupation or life experience.

Mr. Holder said that forcing these people to be considered "experts" under Rule 702 would lead to a number of unfortunate results. Under FED. R. CRIM. P. 16, for example, they would have to file a written summary of their testimony. In civil cases, FED. R. CIV. P. 26(a)(2) may require them to file expert reports. Also by brightening the line between lay and expert testimony, the amendment, he said, would subject the evidentiary rulings of trial judges to greater appellate review. This result would run counter to the thrust of the Supreme Court's decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993), and *Kumho Tire Co. V. Carmichael,* 119 S. Ct. 1167 (1999), which confirmed the discretion of trial courts to weigh the reliability of testimony.

Finally, Mr. Holder said that the net effect of the amendment to Rule 701 would be to require the Department under FED. R. CRIM. P. 16 to disclose in advance of trial the identity of fact witnesses whom it intends to call if part of their testimony entails giving their opinion as to matters they have observed. Such disclosure might in a few cases pose a danger to the life or safety of prospective witnesses.

In conclusion, Mr. Holder urged the committee to reject the rule entirely. Alternatively, he recommended that it be deferred for further consideration by the civil and criminal advisory committees.

Judge Smith said that the Department, basically, objects to brightening the line between Rule 701 lay testimony and Rule 702 expert testimony. But, she said, the line cannot be

brightened completely. There will always be some doubt, and judges will continue to have to exercise judicial discretion. She added that in light of the Supreme Court's decisions in *Daubert* and *Kumho,* it was necessary to provide judges and lawyers with some guidelines in this area.

Judge Smith said that there was a widespread belief among the bar that there have been increasing attempts by attorneys to evade the reliability requirements of Rule 702 by proferring experts in the guise of law witnesses under Rule 701. She added that the proposed amendment to Rule 701 was not intended in any way to change the status of lay opinion or opinion that is based on people's everyday life experiences. Rather, the advisory committee wanted to clarify for the bench and bar how the judicial gatekeeping function should operate. She explained that, as helpful as the *Kumho* decision had been, there still needed to be guidelines set forth in the rules to aid the bench and bar.

Judge Smith pointed out that Mr. Holder's letter of June 9 to the Standing Committee, in discussing FED. R. CIV. P. 26(b)(1), had expressed "grave substantive concerns, shared by the Department, about the Advisory Committee's proposal to modify the most essential element of the federal civil system — the complementary hallmarks of the Federal Rules of Civil Procedure: notice pleading and full discovery of relevant information." She said that full disclosure of information requires that a party give notice to the other party of any specialized knowledge on the part of a witness it intends to call. Only in this way can the court's gatekeeping function be handled properly, with appropriate input from both sides. She said that the basic needs of fairness outweigh the inconvenience of having to disclose more witnesses in some kinds of cases.

Judge Smith reported that the advisory committee had made changes in Rule 701 to ameliorate the concerns of the Department of Justice. She said that the words "within the scope of Rule 702" had been added to the rule after publication to show that witnesses need not be qualified as experts unless they are clearly found to be expert witnesses under Rule 702. She said that the committee had also added several examples to the committee note of the types of lay opinion witnesses who do not need to be qualified as experts. Professor Capra explained that the committee had incorporated the examples from the pertinent case law to help clarify the application of Rules 701 and 702 in light of the concerns of the Department and to assist attorneys in determining in advance how to avoid potential violations of FED. R. CRIM. P. 16.

Mr. Katyal said that the Department's principal concern with the amendment was not that its lawyers would be unable to introduce necessary testimony in court, but that testimony currently admitted under Rule 701 would now be classified as Rule 702 expert testimony. This would require compliance with FED. R. CRIM. P. 16, including pretrial disclosure of the names of witnesses. He noted that the Attorney General has had a long-standing policy on this matter and had written to the chief justice in the past firmly opposing proposed amendments to Rule 16 that would have required pretrial disclosure of government witnesses.

Mr. Katyal said that the United States attorneys and the Criminal Division of the

Department of Justice believe strongly that the proposed amendment will threaten the safety of government witnesses and add to litigation costs. He added that *Kumho* did not require the proposed amendment, and that the bright line fashioned by the proposed amendment would actually undercut *Kumho*.

Judge Scirica suggested that if the rule were adopted, a United States attorney would in an appropriate case petition the court to protect any witness against whom there was a potential threat. Mr. Katyal said that this course of action had in fact been discussed with the United States attorneys, who responded that the amended rule might not authorize that type of action and the district court might in any event deny the government's request. Judge Smith added that the witnesses covered by the rule were, essentially, law enforcement witnesses, rather than potentially endangered lay witnesses.

Judge Scirica asked Judges Davis and Niemeyer to comment on Mr. Holder's alternate recommendation that the proposed amendment to Rule 701 be deferred to obtain the views of the criminal and civil advisory committees. Judge Davis responded that the Advisory Committee on Criminal Rules would have no problem with the proposed amendment. He noted that his committee had consistently called for greater pretrial disclosure under FED. R. CRIM. P. 16 than the Department of Justice has been willing to provide. Judge Niemeyer commented that the Advisory Committee on Civil Rules had not considered the proposed amendment, but that he personally believed that it would be helpful in clarifying the distinction between lay witnesses and expert witnesses.

Mr. Katyal suggested that the committee note be amended to specify that the rule is not intended to require the disclosure of the identify of witnesses if the United States attorney personally avers to the court that the safety of a witness is at stake, or there are facts that tend to reveal that the safety of a witness may be at stake. Professor Capra responded that the additional language would be inappropriate because Rule 702 is an evidence rule, not a disclosure or discovery rule.

The committee approved the proposed amendment to Rule 701 by a vote of 9 to 1.

FED. R. EVID. 702

Judge Smith reported that the advisory committee had made minor changes in the rule following publication: (1) to delete the word "reliable" from Subpart 1 of the proposed amendment; (2) to amend the committee note in several places to add references to the Supreme Court's decision in *Kumho*, which was rendered after publication; (3) to revise the note to emphasize that the amendment does not limit the right to a jury trial or encourage additional challenges to the testimony of expert witnesses; and (4) to add language to the note to clarify that no single factor is necessarily dispositive of the reliability inquiry mandated by Rule 702.

The committee approved the proposed amendment to Rule 702 by a vote of 9 to 0.

FED. R. EVID. 703

Judge Smith reported that the advisory committee had made a few minor, stylistic changes following publication.

The committee approved the proposed amendment to Rule 703 by a vote of 10 to 0.

FED. R. EVID. 803 AND 902

Professor Capra pointed out that the proposed amendments to Rules 803(6) and 902(11) and (12) were part of a single package, allowing certain records of regularly conducted activity to be admitted without the need for calling a foundation witness. He pointed out that two new subdivisions would be added to Rule 902 to provide procedures for the self-authentication of foreign and domestic business records. Professor Capra said that the advisory committee had made minor stylistic changes following publication and had added a phrase to specify that the manner of authentication should comply with any Act of Congress or federal rule.

The committee approved the proposed amendments to Rules 803 and 902 without objection.

REPORT OF THE ATTORNEY CONDUCT RULES SUBCOMMITTEE

Judge Scirica reported that Professor Coquillette and the subcommittee had accomplished a great deal since the last committee meeting. He noted that the subcommittee had held a meeting in Washington in May 1999 that included members of other Judicial Conference committees and a number of people interested and knowledgeable in attorney conduct matters. He said that recent federal legislation had made government attorneys subject to state ethical regulations, and that Chief Justice Veasey and Professor Hazard had been active in working with the Department of Justice in trying to fashion an acceptable rule to govern the subject matter of Rule 4.2 of the A.B.A. Code of Conduct, *i.e.,* contact by government attorneys with represented parties.

Chief Justice Veasey reported that additional progress had been made in the negotiations on this matter among the chief justices, the Department of Justice, and the American Bar Association. He added that two competing bills were pending in the Senate. One, sponsored by Senator Hatch, would preempt state bars from regulating federal prosecutors. The other, sponsored by Senator Leahy, would single out for Judicial Conference action the issue of government attorneys contacting represented parties. He reported that the Conference of Chief Justices had written to Senators Hatch and Leahy informing them that work was proceeding on trying to reach a compromise. He added that Professor Hazard had been very active and very helpful in the negotiations.

Professor Coquillette said that the subcommittee was planning to hold one additional meeting, in Philadelphia in September.

He reported that there are literally hundreds of local federal court rules purporting to govern attorney conduct. Some of them, he said, just adopt the conduct rules of the state in which the federal court sits. Other local rules adopt the A.B.A. Code, and some adopt the A.B.A. canons. Many courts, moreover, appear to ignore their own rules in practice.

Professor Coquillette said that there appeared to be a consensus that attorney conduct obligations should, as a general rule, be governed by the laws of the states. If there are to be any special rules for federal attorneys, they should be limited to a very small core when clear federal interests are at stake. He noted that Professor Cooper was working on a draft "dynamic conformity" rule that would make state conduct rules applicable in the federal courts, but leave open a narrow door for such matters as Rule 4.2 conduct. He said that the draft would be circulated for comment to the subcommittee and the advisory committee reporters. He added that there was a possibility that a proposed resolution of the matter might be brought before the Standing Committee at the January 2000 meeting.

LOCAL RULES PROJECT

Professor Squiers explained in brief the manner in which she had conducted the original local rules project. She explained that in her original study she had gathered the rules of every court and had placed them in five categories: (1) those that were appropriate local rules; (2) those that were so effective that they should be publicized as model rules for the other courts to consider; (3) those that should be incorporated into the national rules; (4) those that were duplicative of the federal rules; and (5) those that were inconsistent with federal law or the national rules. She added that the courts were provided with the results of this work and asked to take appropriate action. Compliance, she said, was voluntary.

Professor Squiers pointed out that the federal rules had been amended in 1995 to require that local rules be renumbered, and most courts had redrafted their rules to meet that requirement. In addition, she said, the Civil Justice Reform Act had led to the adoption of many new local rules, and that some additional local rules changes had been made to take account of the expiration of the Act.

Professor Squiers reported that she planned to follow the same general approach in the new study of local rules, and she invited the members to provide input and guidance. She pointed, for example, to suggestions that she had received that the judicial councils of the circuits should be involved early in the project since they have the authority to oversee and abrogate local rules.

Some of the members pointed out that some of the judicial councils appeared to be very

active in reviewing and acting on local rules, while other councils appeared to be largely inactive in this area. Judge Scirica said that it might be useful for the committee eventually to suggest a model process for the judicial councils to follow in reviewing local rules.

REPORT OF THE STYLE SUBCOMMITTEE

Judge Parker reported that the style subcommittee's efforts had been directed to assisting the Advisory Committee on Criminal Rules in restyling the body of criminal rules. He noted that the style subcommittee had completed a preliminary draft of all the criminal rules, and that the advisory committee would take action on FED. R. CRIM. P. 1-22 at its June 1999 meeting.

NEXT COMMITTEE MEETING

Judge Scirica reported that the next committee meeting had been scheduled for January 6 and 7, 2000.

Respectfully submitted,

Peter G. McCabe,
Secretary

I-D

AGENDA DOCKETING

ADVISORY COMMITTEE ON CRIMINAL RULES

Proposal	Source, Date, and Doc #	Status
[CR 4] — Require arresting officer to notify pretrial services officer, U.S. Marshal, and U.S. Attorney of arrest	Local Rules Project	10/95 — Subc appointed 4/96 — Rejected by subc **COMPLETED**
[CR 5] — Video Teleconferencing of Initial Appearances and Arraignments	Judge Fred Biery 5/98	5/98 — Referred to chair and reporter for consideration 10/98 — Referred to subcmte **PENDING FURTHER ACTION**
[CR 5] — To allow initial appearances, arraignments, attorney status hearings, and possibly petty pleas to be taken by video conferencing.	Judge Durwood Edwards 6/98	6/98 — Referred to chair and reporter for consideration 10/98 — Referred to subcmte **PENDING FURTHER ACTION**
[CR 5(a)] — Time limit for hearings involving unlawful flight to avoid prosecution arrests	DOJ 8/91; 8/92	10/92 — Subc appointed 4/93 — Considered 6/93 — Approved for publication 9/93 — Published for public comment 4/94 — Revised and forwarded to ST Cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CR 5(c)] — Misdemeanor defendant in custody is not entitled to preliminary examination. Cf CR58(b)(2)(G)	Magistrate Judge Robert B. Collings 3/94	10/94 — Deferred pending possible restylizing efforts **PENDING FURTHER ACTION**
[CR 5(c)] — Eliminate consent requirement for magistrate judge consideration	Judge Swearingen 10/28/96 (96-CR-E)	1/97 — Sent to reporter 4/97 — Recommends legislation to ST Cmte 6/97 — Recommitted by ST Cmte 10/97—Adv. Cmte declines to amend provision. 3/98 — Jud Conf instructs rules cmtes to propose amendment 4/98 — Approves amendment, but defers until style project completed 6/98 — Stg Cmte concurs with deferral **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 5.1] — Extend production of witness statements in CR26.2 to 5.1.	Michael R. Levine, Asst. Fed. Defender 3/95	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Approved by ST Cmte 8/96— Published for public comment 4/97— Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[CR 6] — Statistical reporting of indictments	David L. Cook AO 3/93	10/93 — Cmte declined to act on the issue **COMPLETED**
[CR6(a)] — Reduce number of grand jurors	H.R. 1536 introduced by Cong Goodlatte	5/97 — Introduced by Congressman Goodlatte, referred to CACM with input from Rules Cmte 10/97—Adv Cmte unanimously voted to oppose any reduction in grand jury size. 1/98—ST Cmte voted to recommend that the Judicial Conference oppose the legislation. 3/98 — Jud Conf concurs **COMPLETED**
[CR 6(d)] — Allow witness to be accompanied into grand jury by counsel	Omnibus Approp. Act (P.L.105-277)	10/98 — Considered; Subcomm. Appointed 1/99 — Stg Cmte approved subcomm rec. not to allow representation 3/99 — Jud Conf approves report for submission to Congress **COMPLETED**
[CR 6(d)] — Interpreters allowed during grand jury	DOJ 1/22/97 (97-CR-B)	1/97 — Sent directly to chair 4/97 — Draft presented and approved for request to publish 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Approved by Stg Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. **COMPLETED**
[CR 6(e)] — Intra-Department of Justice use of Grand Jury materials	DOJ	4/92 — Rejected motion to send to ST Cmte for public comment 10/94 — Discussed and no action taken **COMPLETED**
[CR 6(e)(3)(C)(iv)] — Disclosure of Grand Jury materials to State Officials	DOJ	4/96 — Cmte decided that current practice should be reaffirmed **COMPLETED**
[CR 6(e)(3)(C)(iv)] — Disclosure of Grand Jury materials to State attorney discipline agencies	Barry A. Miller, Esq. 12/93	10/94 — Considered, no action taken **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR6 (f)] — Return by foreperson rather than entire grand jury	DOJ 1/22/97 (97-CR-A)	1/97 — Sent directly to chair 4/97— Draft presented and approved for publication 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Approved by Stg Cmte 9/98 — Approved by Judicial Conference 4/99 — Approved by Sup. Ct. **COMPLETED**
[CR7(c)(2)] — Reflect proposed new Rule 32.2 governing criminal forfeitures		4/97— Draft presented and approved for publication 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of R. 32.2 rejection by Stg. Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference — 1/99— Approved by Stg Cmte 3/99— Approved by Jud Conf **COMPLETED**
[CR 10] — Arraignment of detainees through video teleconferencing; Defendant's presence not required	DOJ 4/92	4/92 — Deferred for further action 10/92 — Subc appointed 4/93 — Considered 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Action deferred, pending outcome of FJC pilot programs 10/94 — Considered 4/98 —Draft amendments considered, but subcmte appointed to further study 10/98 — Considered by cmte; reporter to redraft and submit at next meeting 4/99 — Considered **PENDING FURTHER ACTION**
[CR 10] — Guilty plea at an arraignment	Judge B. Waugh Crigler 10/94	10/94 — Suggested and briefly considered **DEFERRED INDEFINITELY**
[CR 11] — Magistrate judges authorized to hear guilty pleas, and inform accused of possible deportation	James Craven, Esq. 1991	4/92 — Disapproved **COMPLETED**
[CR 11] — Advise defendant of impact of negotiated factual stipulation	David Adair & Toby Slawsky, AO 4/92	10/92 — Motion to amend withdrawn **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 11(c)] — Advise defendant of any appeal waiver provision which may be contained in plea agreement	Judge Maryanne Trump Barry 7/19/96 (96-CR-A)	10/96 — Considered, draft presented 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to Stg Cmte 6/98 — Approved by Stg Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. **COMPLETED**
[CR 11(d)] — Examine defendant's prior discussions with an government attorney	Judge Sidney Fitzwater 11/94	4/95 — Discussed and no motion to amend **COMPLETED**
[CR 11(e)] — Judge, other than the judge assigned to hear case, may take part in plea discussions	Judge Jensen 4/95	10/95 — Considered 4/96 —Tabled as moot, but continued study by subcmte on other Rule 11 issues **DEFERRED INDEFINITELY**
[CR 11(e)(4) — Binding Plea Agreement (Hyde decision)	Judge George P. Kazen 2/96	4/96 — Considered 10/96 — Considered 4/97 — Deferred until Sup Ct decision **COMPLETED**
[CR 11(e)(1) (A)(B) and (C)] — Sentencing Guidelines effect on particular plea agreements	CR Rules Committee 4/96	4/96 — To be studied by reporter 10/96 — Draft presented and considered 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to Stg Cmte 6/98 — Approved by Stg Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. **COMPLETED**
[CR 11]—Pending legislation regarding victim allocution	Pending legislation 97-98	10/97—Adv Cmte expressed view that it was not opposed to addressing the legislation and decided to keep the subcmte in place to monitor/respond to the legislation.
[CR 11(e)(6) — Court required to inquire whether the defendant is entitled to an adjustment for acceptance of responsibility	Judge John W. Sedwick 10/98 (98-CR-C)	**PENDING FURTHER ACTION**
[CR 12] — Inconsistent with Constitution	Paul Sauers 8/95	10/95 — Considered and no action taken **COMPLETED**
[CR 12(b)] — Entrapment defense raised as pretrial motion	Judge Manuel L. Real 12/92 & Local Rules Project	4/93 — Denied 10/95 — Subcmte appointed 4/96 — No action taken **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 12(i)] — Production of statements		7/91 — Approved by ST Cmte for publication 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR12.2]—authority of trial judge to order mental examination.	Presented by Mr. Pauley on behalf of DOJ at 10/97 meeting.	10/97—Adv Cmte voted to consider draft amendment at next meeting. 4/98 — Deferred for further study of constitutional issues 10/98 — Considered draft amendments, continued for further study 4/99 — Considered **PENDING FURTHER ACTION**
[CR 16] — Disclosure to defense of information relevant to sentencing	John Rabiej 8/93	10/93 — Cmte took no action **COMPLETED**
[CR 16] — Prado Report and allocation of discovery costs	'94 Report of Jud Conf	4/94 — Voted that no amendment be made to the CR rules **COMPLETED**
[CR 16] — Prosecution to inform defense of intent to introduce extrinsic act evidence	CR Rules Committee '94	10/94 — Discussed and declined **COMPLETED**
[CR 16(a)(1)] — Disclosure of experts		7/91 — Approved by for publication by St Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 16(a)(1)(A)] — Disclosure of statements made by organizational defendants	ABA	11/91 — Considered 4/92 — Considered 6/92 — Approved by ST Cmte for publication, but deferred 12/92 — Published 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**
[CR 16(a)(1)(C)] — Government disclosure of materials implicating defendant	Prof. Charles W. Ehrhardt 6/92 & Judge O'Brien	10/92 — Rejected 4/93 — Considered 4/94 — Discussed and no motion to amend **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 16(a)(1)(E)] — Require defense to disclose information concerning defense expert testimony	Jo Ann Harris, Asst. Atty. Gen., CR Div., DOJ 2/94; clarification of the word "complies" Judge Propst (97-CR-C)	4/94 — Considered 6/94 — Approved for publication by ST Cmte 9/94 — Published for public comment 7/95 — Approved by ST Cmte 9/95 — Rejected by Jud Conf 1/96 — Discussed at ST meeting 4/96 — Reconsidered and voted to resubmit to ST Cmte 6/96 — Approved by ST Cmte 9/96 — Approved by Jud Conf 4/97 — Approved by Sup Ct 12/97 — Effective **COMPLETED** 3/97 — Referred to reporter and chair 10/98 — Incorporated in proposed amendments to Rule 12.2 **PENDING FURTHER ACTION**
[CR 16(a) and (b)] — Disclosure of witness names and statements before trial	William R. Wilson, Jr., Esq. 2/92	2/92 — No action 10/92 — Considered and decided to draft amendment 4/93 — Deferred until 10/93 10/93 — Considered 4/94 — Considered 6/94 — Approved for publication by ST Cmte 9/94 — Published for public comment 4/95 — Considered and approved 7/95 — Approved by ST Cmte 9/95 — Rejected by Jud Conf **COMPLETED**
[CR 16(d)] — Require parties to confer on discovery matters before filing a motion	Local Rules Project & Mag Judge Robert Collings 3/94	10/94 — Deferred 10/95 — Subcmte appointed 4/96 — Rejected by subcmte **COMPLETED**
[CR23(b)] — Permits six-person juries in felony cases	S. 3 introduced by Sen Hatch 1/97	1/97 — Introduced as § 502 of the Omnibus Crime Prevention Act of 1997 10/97—Adv. Cmte voted to oppose the legislation 1/98— ST Cmte expressed grave concern about any such legislation. **COMPLETED**
[CR 24(a)] — Attorney conducted voir dire of prospective jurors	Judge William R. Wilson, Jr. 5/94	10/94 — Considered 4/95 — Considered 6/95 — Approved for publication by ST Cmte 9/95 — Published for public comment 4/96 — Rejected by advisory cmte, but should be subject to continued study and education; FJC to pursue educational programs **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 24(b)] — Reduce or equalize peremptory challenges in an effort to reduce court costs	Renewed suggestions from judiciary; Judge Acker (97-CR-E); pending legislation S-3.	2/91 — ST Cmte, after publication and comment, rejected CR Cmte 1990 proposal 4/93 — No motion to amend 1/97 — Omnibus Crime Control Act of 1997 (S.3) introduced [Section 501] 6/97 — Stotler letter to Chairman Hatch **COMPLETED** 10/97—Adv. Cmte decided to take no action on proposal to randomly select petit and venire juries and abolish peremptory challenges. 10/97—Adv. Cmte directed reporter to prepare draft amendment equalizing peremptory challenges at 10 per side. 4/98 — Approved by 6 to 5 vote and will be included In style package **PENDING FURTHER ACTION**
[CR 24(c)] — Alternate jurors to be retained in deliberations	Judge Bruce M. Selya 8/96 (96-CR-C)	10/96 — Considered and agreed to in concept; reporter to draft appropriate implementing language 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to Stg Cmte 6/98 — Approved by Stg Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. **COMPLETED**
[CR 26] — Questioning by jurors	Prof. Stephen Saltzburg	4/93 — Considered and tabled until 4/94 4/94 — Discussed and no action taken **COMPLETED**
[CR 26] — Expanding oral testimony, including video transmission	Judge Stotler 10/96	10/96 — Discussed 4/97 — Subcmte will be appointed 10/97—Subcmte recommended amendment. Adv Cmte voted to consider a draft amendment at next meeting. 4/98 — Deferred for further study 10/98 — Cmte approved, but deferred request to publish until spring meeting or included in style package 4/99 — Considered **PENDING FURTHER ACTION**
[CR 26] — Court advise defendant of right to testify	Robert Potter	4/95 — Discussed and no motion to amend **COMPLETED**
[CR 26.2] — Production of statements for proceedings under CR 32(e), 32.1(c), 46(i), and Rule 8 of § 2255		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 26.2] — Production of a witness' statement regarding preliminary examinations conducted under CR 5.1	Michael R. Levine, Asst. Fed. Defender 3/95	10/95 — Considered by cmte 4/96 — Draft presented and approved 6/96 — Approved by ST Cmte 8/96 — Published for public comment 4/97— Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Jud Conf approves 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[CR26.2(f)] — Definition of Statement	CR Rules Cmte 4/95	4/95 — Considered 10/95 — Considered and no action to be taken **COMPLETED**
[CR 26.3] — Proceedings for a mistrial		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 29(b)] — Defer ruling on motion for judgment of acquittal until after verdict	DOJ 6/91	11/91 — Considered 4/92 — Forwarded to ST Cmte for public comment 6/92 — Approved for publication, but delayed pending move of RCSO 12/92 — Published for public comment on expedited basis 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**
[CR 30] — Permit or require parties to submit proposed jury instructions before trial	Local Rules Project	10/95 — Subcmte appointed 4/96 — Rejected by subcmte **COMPLETED**
[CR 30] — discretion in timing submission of jury instructions	Judge Stotler 1/15/97 (97-CR-A)	1/97 — Sent directly to chair and reporter 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Deferred for further study 10/98 — Considered by cmte, but deferred pending Civil Rules Cmte action on CV 51 **PENDING FURTHER ACTION**
[CR 31] — Provide for a 5/6 vote on a verdict	Sen. Thurmond, S.1426, 11/95	4/96 — Discussed, rulemaking should handle it **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 31(d)] — Individual polling of jurors	Judge Brooks Smith	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Approved by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[31(e)] — Reflect proposed new Rule 32.2 governing criminal forfeitures		4/97— Draft presented and approved for publication 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of rejection of R. 32.2 by Stg Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference 1/99— Approved by Stg Cmte 3/99 — Approved by Jud Conf **COMPLETED**
[CR 32] — Amendments to entire rule; victims' allocution during sentencing	Judge Hodges, before 4/92; pending legislation reactivated issue in 1997/98.	10/92 — Forwarded to ST Cmte for public comment 12/92 — Published 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED** 10/97—Adv Cmte expressed view that it was not opposed to addressing the legislation and decided to keep the subcmte in place to monitor/respond to the legislation. **PENDING FURTHER ACTION**
[CR 32]—mental examination of defendant in capital cases	Extension of amendment to CR 12.2(DOJ) at 10/97 meeting.	10/97— Adv Cmte voted to proceed with the drafting of an amendment. 10/98 — Incorporated in proposed amendments to Rule 12.2 **PENDING FURTHER ACTION**
[CR 32]—release of presentence and related reports	Request of Criminal Law Committee	10/98 — Reviewed recommendation of subcomm and agreed that no rules necessary **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 32(d)(2) — Forfeiture proceedings and procedures reflect proposed new Rule 32.2 governing criminal forfeitures	Roger Pauley, DOJ, 10/93	4/94 — Considered 6/94 — Approved by ST Cmte for public comment 9/94 — Published for public comment 4/95 — Revised and approved 6/95 — Approved by ST Cmte 9/95 — Approved by Jud Conf 4/96 — Approved by Sup Ct 12/96 — Effective **COMPLETED** 4/97— Draft presented and approved for publication 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of rejection of R. 32.2 by Stg Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference 1/99— Approved by Stg Cmte 3/99 — Approved by Jud Conf **COMPLETED**
[CR 32(e)] — Delete provision addressing probation and production of statements (later renumbered to CR32(c)(2))	DOJ	7/91 — Approved by ST Cmte for publication 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective **COMPLETED**
[CR 32.1] — Production of statements		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 32.1]— Technical correction of "magistrate" to "magistrate judge."	Rabiej (2/6/98)	2/98—Letter sent advising chair & reporter 4/98 — Approved, but deferred until style project completed **PENDING FURTHER ACTION**
[CR 32.1]—pending victims rights/allocution litigation	Pending litigation 1997/98.	10/97—Adv Cmte expressed view that it was not opposed to addressing the legislation and decided to keep the subcmte in place to monitor/respond to the legislation. **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 32.2] — Create forfeiture procedures	John C. Keeney, DOJ, 3/96 (96-CR-D)	10/96 — Draft presented and considered 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Rejected by Stg Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference 1/99 — Approved by Stg Cmte 3/99 — Approved by Jud Conf **COMPLETED**
[CR 33] — Time for filing motion for new trial on ground of newly discovered evidence	John C. Keeney, DOJ 9/95	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[CR 35(b)] — Recognize combined pre-sentencing and post-sentencing assistance	Judge T. S. Ellis, III 7/95	10/95 — Draft presented and considered 4/96 — Forwarded to ST Cmte 6/96 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[CR 35(b)] — Recognize assistance in any offense	S.3, Sen Hatch 1/97	1/97 — Introduced as § 602 and 821 of the Omnibus Crime Prevention Act of 1997 6/97 — Stotler letter to Chairman Hatch **COMPLETED**
[CR 35(c)] — Correction of sentence, timing	Jensen, 1994 9th Cir. decision	10/94 — Considered 4/95 — No action pending restylization of CR Rules 4/99 — Considered **PENDING FURTHER ACTION**
[CR35(b)] — Substantial asssistance provided after one year	Judge Edward E. Carnes 3/99 (99-CR-A)	**PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 38(e)] — Conforming amendment to CR 32.2		4/97— Draft presented and approved for publication 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of rejection of R. 32.2 by Stg Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference 1/99— Approved by Stg Cmte 3/99 — Approved by Jud Conf **COMPLETED**
[CR 40] — Commitment to another district (warrant may be produced by facsimile)		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 40] —Treat FAX copies of documents as certified	Mag Judge Wade Hampton 2/93	10/93 — Rejected **COMPLETED**
[CR 40(a)] — Technical amendment conforming with change to CR5	Criminal Rules Cmte 4/94	4/94 — Considered, conforming change no publication necessary 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CR 40(a)] —Proximity of nearest judge for removal proceedings	Mag Judge Robert B. Collings 3/94	10/94 — Considered and deferred further discussion until 4/95 10/96 — Considered and rejected **COMPLETED**
[CR 40(d)] — Conditional release of probationer; magistrate judge sets terms of release of probationer or supervised release	Magistrate Judge Robert B. Collings 11/92	10/92 — Forwarded to ST Cmte for publication 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**
[CR 41] — Search and seizure warrant issued on information sent by facsimile		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 41] — Warrant issued by authority within the district	J.C. Whitaker 3/93	10/93 — Failed for lack of a motion **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 41(c)(2)(D)] — recording of oral search warrant	J. Dowd 2/98	4/98 — Tabled until study reveals need for change **DEFERRED INDEFINITELY**
[CR 41(c)(1) and (d) — enlarge time period	Judge B. Waugh Crigler 11/98 (98-CR-D)	**PENDING FURTHER ACTION**
[CR 41(d)] — covert entry for purposes of observation only	DOJ 9/2/99	10/99 — Considered **PENDING FURTHER ACTION**
[CR 41(d)] — tracking devices	DOJ 7/15/99	10/99 — Considered **PENDING FURTHER ACTION**
[CR 43(b)] —Sentence absent defendant	DOJ 4/92	10/92 — Subcmte appointed 4/93 — Considered 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Deleted video teleconferencing provision & forwarded to ST Cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CR 43(b)] — Arraignment of detainees by video teleconferencing		10/98 — Subcmte appointed 4/99 — Considered **PENDING FURTHER ACTION**
[CR 43(c)(4)] — Defendant need not be present to reduce or change a sentence	John Keeney, DOJ 1/96	4/96 — Considered 6/96 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[CR 43(c)(5) — Defendant to waive personal arraignment on subsequent, superseding indictments and enter plea of not guilty in writing	Judge Joseph G. Scoville, 10/16/97 (97-CR-I) and Mario Cano 97---	10/97 — Referred to reporter and chair 4/98 —Draft amendments considered, subcmte appointed 10/98 — Cmte considered; reporter to submit draft at next meeting **PENDING FURTHER ACTION**
[CR 46] — Production of statements in release from custody proceedings		6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 46] — Release of persons after arrest for violation of probation or supervised release	Magistrate Judge Robert Collings 3/94	10/94 — Defer consideration of amendment until rule might be amended or restylized **PENDING FURTHER ACTION**
[CR 46] — Requirements in AP 9(a) that court state reasons for releasing or detaining defendant in a CR case	11/95 Stotler letter	4/96 — Discussed and no action taken **COMPLETED**
[CR 46 (e)] — Forfeiture of bond	H.R. 2134	4/98 — Opposed amendment **COMPLETED**
[CR 46(i)] — Typographical error in rule in cross-citation	Jensen	7/91 — Approved for publication by ST Cmte 4/94 — Considered 9/94 — No action taken by Jud Conf because Congress corrected error **COMPLETED**
[CR 47] — Require parties to confer or attempt to confer before any motion is filed	Local Rules Project	10/95 — Subcmte appointed 4/96 — Rejected by subcmte **COMPLETED**
[CR 49] — Double-sided paper	Environmental Defense Fund 12/91	4/92 — Chair informed EDF that matter was being considered by other cmtes in Jud Conf **COMPLETED**
[CR 49(c)] — Fax noticing to produce substantial cost savings while increasing efficiency and productivity	Michael E. Kunz, Clerk of Court 9/10/97 (97-CR-G)	9/97 — Mailed to reporter and chair 4/98 — Referred to Technology Subcmte 4/99 — Considered **PENDING FURTHER ACTION**
[CR49(c)] — Facsimile service of notice to counsel	William S. Brownell, 10/20/97 (CR-J)	11/97 — Referred to reporter and chair, pending Technology Subcmte study 4/99 — Considered **PENDING FURTHER ACTION**
[CR 49(e)] —Delete provision re filing notice of dangerous offender status — conforming amendment	Prof. David Schlueter 4/94	4/94 — Considered 6/94 — ST Cmte approved without publication 9/94 — Jud Conf approved 4/95 — Sup Ct approved 12/95 — Effective **COMPLETED**
[CR53] — Cameras in the courtroom		7/93 — Approved by ST Cmte 10/93 — Published 4/94 — Considered and approved 6/94 — Approved by ST Cmte 9/94 — Rejected by Jud Conf 10/94 — Guidelines discussed by cmte **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR54] — Delete Canal Zone	Roger Pauley, minutes 4/97 mtg	4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to Stg Cmte 6/98 —Approved by Stg Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. **COMPLETED**
[CR 57] — Local rules technical and conforming amendments & local rule renumbering	ST meeting 1/92	4/92 — Forwarded to ST Cmte for public comment 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Forwarded to ST Cmte 12/95 — Effective **COMPLETED**
[CR 57] — Uniform effective date for local rules	Stg Cmte meeting 12/97	4/98 — Considered an deferred for further study **PENDING FURTHER ACTION**
[CR 58] — Clarify whether forfeiture of collateral amounts to a conviction	Magistrate Judge David G. Lowe 1/95	4/95 — No action **COMPLETED**
[CR 58 (b)(2)] — Consent in magistrate judge trials	Judge Philip Pro 10/24/96 (96- CR-B)	1/97 — Reported out by CR Rules Cmte and approved by ST Cmte for transmission to Jud Conf without publication; consistent with Federal Courts Improvement Act 4/97 — Approved by Sup Ct 12/97 — Effective **COMPLETED**
[CR 59] — Authorize Judicial Conference to correct technical errors with no need for Supreme Court & Congressional action	Report from ST Subcommittee on Style	4/92 — Considered and sent to ST Cmte 6/93 — Approved for publication by ST Cmte 10/93 — Published for public comment 4/94 — Approved as published and forwarded to ST Cmte 6/94 — Rejected by ST Cmte **COMPLETED**
[Megatrials] — Address issue	ABA	11/91 — Agenda 1/92 — ST Cmte, no action taken **COMPLETED**
[Rule 8. Rules Governing §2255] — Production of statements at evidentiary hearing		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[Rules Governing Habeas Corpus Proceedings]— miscellaneous changes to Rule 8 & Rule 4 for §2255 & §2254 proceedings	CV Cmte	10/97 — Subcmte appointed 4/98 — Considered; further study 10/98 — Cmte approved some proposals and deferred others for further consideration **PENDING FURTHER ACTION**
[CR8(c)] — Apparent mistakes in Federal Rules Governing § 2255 and § 2254	Judge Peter Dorsey 7/9/97 (97-CR-F)	8/97 — Referred to reporter 10/97 — Referred to subcmte 4/98 — Cmte considered 10/98 — Cmte considered **PENDING FURTHER ACTION**
[U.S. Attorneys admitted to practice in Federal courts]	DOJ 11/92	4/93 — Considered **COMPLETED**
[Restyling CR Rules]		10/95 — Considered 4/96 — On hold pending consideration of restyled AP Rules published for public comment 4/98 — Advised that Style Subc intends to complete first draft by the end of the year 12/98 — Style subcmte completes its draft 4/99 — Considered Rules 1-9 6/99 — Considered Rules 1-22 **PENDING FURTHER ACTION**
Style: Rules 1-9	SubCmte A	4/99 — Considered

II-C-1

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rules 10 & 43; Videoteleconferencing for Arraignments and Other Proceedings.**

DATE: **September 8, 1999**

Attached are materials that address the topic of whether Rules 10 and 43 should be amended to permit video teleconferencing for arraignments and other proceedings. A subcommittee, chaired by Judge Roll, is currently considering what, if any, amendment to propose to the Committee.

The materials are a collection of recent memos addressing the topic as well as materials from the Committee's efforts in 1992-94 to amend the rules to permit videoteleconferencing. As you will see from those materials, this issue has been before the Committee, off and on, for over seven years. The issue resulted in a proposed amendment to Rules 10 and 43 which was published for comment. Those amendments would have permitted teleconferencing for an arraignment where the defendant waived a personal appearance. That proposed change was driven in large part by the Bureau of Prisons which was interested in reducing costs and security risks associated with transporting prisoners long distances for what in most cases was only a brief appearance. The issue was tabled in 1994, however, with the thought that several on-going FJC pilot programs might assist the Committee in deciding the best way to proceed. Those projects provided no real input.

The most recent discussion was generated by a 1998 memo from Judge Biery (W.D. Texas) to Judge Stotler recommending that the Criminal Rules (in particular Rule 5) be amended to permit initial appearances and arraignments to be conducted through teleconferencing.

United States District Court
District of Arizona
The James A. Walsh Courthouse
44 E. Broadway
Tucson, Arizona 85701-1719

John M. Roll
District Judge

520-620-7144

August 24, 1999

John K. Rabiej
Chair, Rules Committee Support Office
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Mr. Rabiej,

Attached is 1) a proposed revision of Federal Rule of Criminal Procedure 10; 2) a March 15, 1999 memorandum prepared by my law clerk regarding video-conferencing criminal justice proceedings which had previously been distributed to committee members; and 3) an August 23, 1999 supplemental memo regarding video-conferencing. These materials are for distribution to the sub-committee in anticipation of our telephonic conference on ~~August 30, 1999.~~ Sept. 7, 1999

Best Wishes,

JOHN M. ROLL
District Court Judge

JMR:cp

Proposed Revision to Federal Rule of Criminal Procedure 10

Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead thereto. The defendant shall be given a copy of the indictment or information before being called upon to plead. **Nothing in this Rule, or Rule 43, shall preclude the arraignment from being conducted by video-teleconferencing.**

MEMORANDUM

TO: Judge Roll

FROM: Chris Price, Law Clerk

DATE: August 24, 1999

RE: Supplemental Memo to March 15, 1999 Video-conferencing Arraignments Memo

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This memo supplements a previous memo, dated March 15, 1999, which discussed the practice of conducting arraignments by video-conference. This supplement briefly discusses practical matters that may be relevant should the Rules Committee decide to pursue modifing the Federal Rules of Criminal Procedure so as to permit defendants' appearances at initial appearances and arraignments to be conducted by video-conferencing. The location and substance of the modification of the Federal Rules of Criminal Procedure are important considerations.

Creation of New Rule or Revision of Existing Rules

Assuming that the Committee decides that it should be permissible to conduct initial appearances and arraignments by video-conference, the Committee would have to decide whether to create a new rule or alter existing rules. An important consideration of this issue is the Ninth's Circuit discussion of Rules 10 and 43 in Valenzuela-Gonzalez v. United States District Court, 915 F.2d 1276 (9th Cir. 1990). Because Valenzuela-Gonzalez found that Rules 10 and 43 mandated the physical presence of

defendants at arraignments, a revision of the rules should address both Rule 10 and Rule 43 to ensure an effective modification.[1]

The Committee would also have to decide the substance of any rule authorizing video-conferencing. The states which have authorized arraignment by video-conference have not been uniform in approach. There are a variety of ways in which the Federal Rules of Criminal Procedure could provide for the use of video-conferencing for initial appearances and arraignments.

Who Decides

An important issue regarding appearances by video-conferencing for certain pre-trial matters is who decides when the procedure should be utilized. Whether the Federal Rules of Criminal Procedure permit the defendant or the court to decide when to employ video-conferencing for initial appearances and arraignments may substantially affect the practical impact of video-conferencing.

There appears to be three basic approaches adopted by the states. These approaches are discussed below, and included is a representative rule or statute from a state that has adopted that approach.

1. Local Rule Option

Many states have passed statutes or rules of criminal procedure that permit the courts to establish video-conferencing of

[1] Modification of Federal Rule of Criminal Procedure 5(a) would also have to be considered should the Committee decide that it is desirable to conduct initial appearances by video-conference.

arraignments by local rule. For example, Louisiana procedure provides:

> Nothing in this rule shall prohibit the court, by local rule, or the defense counsel from providing for a defendant's appearance at his arraignment by simultaneous audio-visual transmission. The court may, by local rule, provide for the defendant's appearance at the arraignment and the entry of his plea by way of simultaneous transmission through audio-visual electronic equipment.

La. Code Crim. Proc. art. 551.

2. Waiver by Defendant

Another approach some states have taken is to allow video-conferencing of arraignments only when the defendant consents. Hawaii procedure is as follows:

> Video teleconferencing may be used to arraign a defendant not physically present in court, if the defendant waives the right to be arraigned in open court.

Haw. R. Penal P. 10.

3. Discretion of the Court

Probably the most wide-spread approach among the states is to allow each court to utilize video-conferencing at its discretion. Montana's approach illustrates this:

> A defendant's initial appearance [and arraignment] before a judge may, in the discretion of the court, be satisfied either by the defendant's physical appearance before the court or by two-way electronic audio-video communications. The audio-video communication must operate so that the defendant and the judge can see each other simultaneously and converse with each other and so that the defendant and his counsel, if any, can communicate privately.

Mont. Code § 46-7-101.

Level of Specificity

Another important consideration regarding the substance of a modified rule is the level of specificity that it should include.

1. General Approach

Some states have adopted broad rules that permit video-conferencing, but do not specifically provide for the procedure to be used. Hawaii's rule is illustrative of this approach:

> Video teleconferencing may be used to arraign a defendant not physically present in court, if the defendant waives the right to be arraigned in open court.

Haw. R. Penal P. 10.

2. Specific Approach

Some states, however, have adopted very detailed rules or procedures that are to be utilized during video-conferencing.

> Whenever the law requires a defendant in a criminal case to appear before any judge or magistrate for a first or subsequent appearance, bail, arraignment, or other pre-trial proceeding, at the discretion of the court, the proceeding may be conducted by an audio-video communication device, in which case the defendant shall not be required to be physically brought before the judge or magistrate. The audio-video communication shall enable the judge or magistrate to see and converse simultaneously with the defendant or other person and operate so that the defendant and his or her counsel, if any, can communicate privately, and so that the defendant and his or her counsel are both physically present int he same place during the audio-video communication. The signal of the audio-video communication shall be transmitted live and shall be secure from interception through lawful means by anyone other than the persons communicating. Nothing herein shall be construed as affecting the defendant's right to waive counsel.

Ala. Code § 15-26-1.

Conclusion

The above discussion focuses on practical matters relevant to

a decision to modify the Rules of Criminal Procedure so as to permit initial appearances and arraignments to be conducted by video-conference.

MEMORANDUM

TO: Judge Roll

FROM: Chris Price, Law Clerk

DATE: March 15, 1999

RE: Video-conferencing Arraignments

Overview

Closed-circuit television for arraignments began in the late 1970s. Thereafter, in 1982, Dade County, Florida adopted video-conferencing for arraignments in misdemeanor cases. Such systems have become increasingly popular. Informal estimates indicate that between 160 and 200 systems were in operation in U.S. jurisdictions as of 1994. See Frederic I. Lederer, Technology Comes to the Courtroom, And ..., 43 Emory L.J. 1095, 1102 (Summer 1994).

Professor Lederer provides the following description of the process:

> Remote arraignments have the defendant in jail, ordinarily in a special room designated for the purpose. The judge and prosecution in the courtroom; depending on the jurisdiction and counsel's personal choice, defense counsel may either be in the courtroom or at the jail with the client. The arraignment is accomplished by live two-way television. The television can be as basic as a two-camera system, with one camera at each location, or as sophisticated as ... [a] six-camera system, which shows the defendant every aspect of the courtroom.

Id.

Despite the increasing use of video-conferencing by state

courts, the federal system has not seen the wide-spread use of video arraignments. Although there are few federal decisions regarding the use of video-conferencing in court, circuit courts have interpreted the Federal Rules of Criminal Procedure as requiring a defendant's actual presence in the courtroom.

Federal Law

Two federal circuit courts have addressed the use of video-conferencing in criminal proceedings. First, the Ninth Circuit found that arraignments could not be conducted via video-conference. See Valenzuela-Gonzalez v. United States District Court, 915 F.2d 1276 (9th Cir. 1990). Thereafter, the Fifth Circuit concluded that sentencing hearings could not be conducted via video-conference. See United States v. Navarro, __ F.3d __, 1999 WL 118338 (5th Cir. 1999).

In June 1990, the District of Arizona issued General Order No. 190, establishing a pilot program which allowed judges and magistrates to use closed-circuit television or video-conferencing to conduct arraignments.[1] In an appeal by a defendant who had been arraigned using this procedure, the Ninth Circuit found that using

[1] General Order No. 190 stated:

> IT IS ORDERED that for a period of one year from the date of filing of this Order, in the discretion of any district judge or magistrate of the District of Arizona, initial appearances and arraignments of pretrial detainees may be conducted by video-conferencing. The attorney for the defendants may elect to be present by video with the defendant or may appear personally in the hearing room at the District Courthouse. A defendant having his initial appearance before a federal magistrate may be taken before such magistrate by video when authorized by that judicial offer.

video-conferencing for defendants' appearances at arraignments violated Federal Rules of Criminal Procedure 10 and 43. See Valenzuela-Gonzalez, 915 F.2d at 1276.

Fed.R.Crim.P. 10 provides that "[a]rraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead thereto." In Valenzuela-Gonzalez, the Ninth Circuit placed particular importance on Rule 10's requirement that the arraignment take place in "open court." 915 F.2d at 1280-81.

Fed.R.Crim.P. 43(a) states that "[t]he defendant shall be present at the arraignment, at the time of plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule." In Valenzuela-Gonzalez, the Ninth Circuit stated that the defendant was not present, for purposes of Rule 43(a), because he appeared by closed-circuit television. 915 F.2d at 1280. The Ninth Circuit concluded "that [Rules 10 and 43(a)] together require that the district court must arraign the accused face-to-face with the accused physically present in the courtroom." Id.

The Ninth Circuit did not address the Fifth and Sixth Amendment constitutional challenges to video-conferencing, but noted that there was no due process right to an arraignment, and that the Sixth Amendment right to confrontation was not implicated because there were no witnesses. Id. Significantly, the Ninth

Circuit stated, "[a]bsent a determination by Congress that closed-circuit television may satisfy the presence requirement of the rules, we are not free to ignore the clear instructions of Rules 10 and 43." Id. at 1281.

In United States v. Navarro, 1999 WL 118338, at *1, the Fifth Circuit vacated United States v. Edmondson, 10 F. Supp.2d 651, 653 (E.D. Tex. 1998), which had upheld a sentencing hearing conducted via video-conference. In so ruling, a divided panel of the Fifth Circuit followed the lead of the Ninth Circuit in Valenzuela-Gonzalez, finding that "[Fed.R.Crim.P.] 43, as written, requires the defendant's physical presence in court during sentencing." Navarro, 1999 WL 118338, at *6.

The Fifth Circuit did not directly address the constitutionality of sentencing via video-conferencing, but noted that Rule 43 protected defendants' confrontation and due process rights. Id. at *8. Importantly, however, the Fifth Circuit concluded its opinion by quoting the Ninth Circuit: "'Absent a determination by Congress that closed-circuit television may satisfy the presence requirement of the rules, [we are] not free to ignore the clear instructions of Rule [] ...43.'" Id. (quoting Valenzuela-Gonzalez, 915 F.2d at 1281.). Accordingly, Valenzuela-Gonzalez and Navarro demonstrate that the principle impediments to video-conferencing are found within the Federal Rules of Criminal Procedure. Neither circuit found that the use of video-conferencing to conduct the proceeding involved was

unconstitutional.[2]

Federal courts have also considered challenges to the use of video-conferencing in civil proceedings.[3]

State Law

a. Authority for Video-conferencing

At least 23 states have adopted the use of video-conferencing for arraignment appearances.[4] Hawaii is one of the states to recently amend its rules to allow video-conferencing for the arraignment of defendants.[5]

In 1996, Hawaii Chief Justice Moon stated:

[A]pproximately 39% of all defendants in the First

---

[2] However, in Navarro, the Fifth Circuit observed that as to stages of trial, "[v]ideo conferencing would seemingly violate a defendant's Confrontation Clause rights...." Id. at *8.

[3] See, e.g., United States v. Baker, 45 F.3d 837, 847 (4th Cir. 1995) (respondent's due process rights were not violated by use of video-conferencing during civil commitment hearing); Edwards v. Logan, __ F. Supp.2d __, 1999 WL 92891 (W.D. Va. 1999) (section 1983 jury trial conducted entirely by video-conference was proper because plaintiff would be "virtually present at his trial and will have the ability to confront witnesses, address the jury, and participate fully").

[4] The following states have authorized video-conferencing for arraignments by statute or rule: Alabama (Ala. Code § 15-26-1); Alaska (Alaska Crim. R. 38.2); Arizona (Ariz.R.Crim.P. 14.2); California (Cal. Penal Code § 977); Delaware (Del.Super.Ct.Crim.R. 10); Florida (Fla.R.Crim.P. 3.160); Hawaii (Haw.R.PenalP. 10); Idaho (Idaho Ct. R. 43.1); Illinois (Ill. St. Ch. 725 § 5/106D-1); Iowa (I.C.A. § 813.2, Rule 25); Kansas (Kan. Stat. Ann. § 22-3205); Louisiana (La. Code Crim. Proc. art. 230.1); Michigan (Mich. Comp. Laws § 767.37a); Missouri (Mo. Rev. Stat. § 561.031); Montana (Mont. Code Ann. § 46-12-201); Nevada (Nev. Rev. Stat. § 178.388); New Mexico (N.M.R.Crim.P. 5-303); North Carolina (N.C. Gen. Stat. § 15A-941); Oregon (Or. Rev. St. § 135.030); Tennessee (Tenn. Code Ann. § 40-14-316); Virginia (Va. Code Ann. § 19.2-3.1); Washington (Wa.R.G.R. 19); and Wisconsin (Wisc. Stat. § 970.01).

[5] Haw. R. Penal P. 10.

> Circuit [of Hawaii] were arraigned or processed via audio-visual linkup.... The results show that savings in overtime costs, along with more effective and efficient utilization of court, correctional, and security personnel were achieved.... [C]ase processing time has been reduced by at least 50 percent, and because of decreased staff demands on the Department of Public Safety (DPS), the DPS has saved 2,400 hours of staff time, which translates to $45,000 annually.

Hon. Ronald T.Y. Moon, 1995 State of the Judiciary Address, Haw. B.J. 25, at 28 (Jan. 1996).

State court opinions that have struck down video-conferencing have rested on a lack of statutory authorization for such procedures. See R.R. v. Protesy, 629 So.2d 1059 (Fla. Ct. App. 1994) (use of video-conference for juvenile detention hearing violated Florida Rule of Juvenile Procedure 8.100(a)).[6] See also Jacobs v. State, 567 So.2d 16, 17 (Fla. Ct. App. 1990) (use of audiovisual equipment for sentencing was error because it was not authorized by the Florida Rules of Criminal Procedure).

b. Arraignments

Challenges to the constitutionality of video-conference arraignment statutes in state courts have been unsuccessful. See, e.g., Larose v. Superintendent, Hollsorough County Correction Admin., 702 A.2d 326, 329-30 (N.H. 1997) (arraignments and bail hearings conducted by video-conferences did not violate

[6] Shortly after this ruling, judges in Florida's fifth, ninth, thirteenth, seventeenth, and nineteenth circuits petitioned the Florida Supreme Court to amend the Rules of Juvenile Procedure to allow juveniles to attend detention hearings via audiovideo device. See Amendment to Florida Rule of Juvenile Procedure 8.100(a), 667 So.2d 195 (Fla. 1996). In response, the Florida Supreme Court authorized "the chief judge in each of the above circuits to institute a one-year pilot program that will allow juveniles to attend detention hearings via audiovideo device. Id. at 197.

petitioners' due process rights); State v. Phillips, 656 N.E.2d 643, 665 (Ohio 1995) (closed-circuit television arraignment is "constitutionally adequate"); Commonwealth v. Terbieniec, 408 A.2d 1120, 1124 (Pa. Super. Ct. 1979) ("no unconstitutional prejudice inherent in appellant's arraignment" utilizing closed-circuit television).

c. Other Proceedings

State courts have also upheld the use of video-conferencing for entry of pleas, Scott v. State, 618 So.2d 1386, 1388 (Fla. Ct. App. 1993) ("For constitutional purposes, this audio-video hookup may well be the legal equivalent of physical presence."), bail hearings, Larose, 720 A.2d at 326, and post-conviction relief hearings, Guinan v. State, 769 S.W.2d 427 (Mo. 1989) (use of closed-circuit television for post-conviction relief hearing did not violate defendant's confrontation, equal protection, due process, or effective representation rights).

d. Procedures Regarding Video-conferences

There are variations, however, among the state rules regarding video-conferencing. Some states allow arraignments to be conducted by video only if the defendant agrees, see, e.g., Cal. Penal Code § 977 ("If the accused agrees, the initial court appearance, arraignment, and plea may be by video."), while others place the matter in the discretion of the court. See, e.g., Ala. Code § 15-26-1 ("[A]t the discretion of the court, the [arraignment] proceeding may be conducted by an audio-visual communication device.").

Some jurisdictions simply allow their courts to adopt rules providing for video arraignment, see, e.g., La.C.Crim.P. art. 551 ("The court may, by local rule, provide for the defendant's appearance at the arraignment and the entry of his plea by way of simultaneous transmission through audio-visual electronic equipment."), while other statutes detail the types of procedures that must be followed. See, e.g., Mont. Code. Ann. § 46-12-201 ("The audio-video communication must operate so that the defendant and the judge can see each other simultaneously and converse with each other and so that the defendant and his counsel, if any, can communicate privately.").

Furthermore, some states restrict the use of video-conferencing to noncapital cases, see, e.g., N.C. Gen. Stat. § 15A-941, and a few states restrict the use of video-conferences to misdemeanor proceedings. See, e.g., Or. Rev. St. § 135.030(2).

Summary

The use of video-conferencing to conduct arraignments has dramatically increased. At least 23 states have adopted statutes or rules permitting the use of such systems. The Ninth and Fifth Circuits, however, have interpreted Fed.R.Civ.P. 43(a) as requiring a defendant's physical presence in the courtroom during criminal proceedings.

In light of these decisions, before video arraignments are permissible in the federal courts, amendment of the Federal Rules of Criminal Procedure may be necessary. See Valenzuela-Gonzalez, 915 F.2d at 1281; Navarro, 1999 WL 118338, at *12. No federal or

state court has found that video arraignments are unconstitutional. In fact, the state courts that have addressed the constitutionality of video arraignments have affirmed their use.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
SUITE 173
WALTER E. HOFFMAN UNITED STATES COURTHOUSE
600 GRANBY STREET
NORFOLK, VIRGINIA 23510-1915
(757) 222-7007

CHAMBERS OF
TOMMY E. MILLER
UNITED STATES MAGISTRATE JUDGE

FACSIMILE NO.
(757) 222-7027

August 25, 1999

BY FAX AND U.S. MAIL

The Honorable John M. Roll
United States District Judge
415 James A. Walsh Courthouse
44 East Broadway Boulevard
Tucson, AZ 85701-1711

Re: Audio-Video Conferencing

Dear John:

You requested that I present to you my thoughts concerning the use of videoconferencing at initial appearances, arraignments, and perhaps even at other pretrial proceedings. I understand that we will attempt to have a subcommittee meeting by conference call in the near future.

Jackie McIntyre, my law clerk, did a Westlaw search for the states that have audio-video conferencing by statute or rule. She discovered reference in the laws or rules of Alabama, California, Kansas, Texas, and Virginia. Attached to this letter are these references.

There are at least two areas where policy decisions have to be made. First, should the defendant have a right to demand a personal appearance in court? Dan Wathen told us that the Maine experience demonstrated that defendants rarely consented and therefore the videoconferencing program did not work. Kansas requires the defendant to be advised of the right to be personally present in the courtroom. Kansas Stat. Ann. 22-3205(b) (1998). Texas requires the defendant and defense attorney to file written consent to the use of videoconferencing. Texas Crim. Pro. Art. 27.18(a)(1) (1997). The other states do not require the defendant's consent.

I suspect that if videoconferencing is to have any practical use, any rule must leave the decision whether to use videoconferencing up to the judicial officer. If the consent of the defendant is required by rule, I think that the videoconferencing will be used too seldom to justify the expense of the hardware.

The second policy decision we must address is whether defense counsel should be entitled to be located with either the defendant personally or with the judicial officer. The California statute

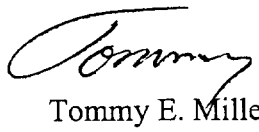
sets forth in the most detail the options available to the defendant and counsel. California Penal Code § 977.2(a)(3) (1998).

My guess is that defense counsel will favor being present with the defendant in the jail. If the jail is on the mainland U.S. and the court is in Hawaii, then much of the economics of videoconferencing will be lost in indigent cases if the court has to pay the cost of counsel flying to California to be with a defendant at an initial appearance, arraignment or some other pretrial hearing. Secure and separate communication lines for counsel and the defendant could address some of these concerns.

Professor Fredric Lederer of Courtroom 21 at William and Mary and I have exchanged several telephone calls without connecting. I will forward to you any information from him when we finally connect. He can show us the up-to-date technology when we visit Courtroom 21 on October 6, 1999 at 7:30 p.m.

I look forward to the conference call. I am sending a copy of this letter to the subcommittee members to save John Rabiej's time.

Yours sincerely,



Tommy E. Miller
United States Magistrate judge

TEM:plc

Enclosures

cc: The Honorable Susan C. Bucklew
Darryl W. Jackson, Esq.
Roger A. Pauley, Esq.
Professor David A. Schlueter, Reporter
John Rabiej, Chief
Rules Committee Support Staff
Administrative Office of the United States Courts

AL ST s 15-26-1
Ala.Code 1975 s 15-26-1

TEXT

CODE OF ALABAMA
TITLE 15. CRIMINAL PROCEDURE.
CHAPTER 26. AUDIO-VIDEO COMMUNICATION FOR CRIMINAL PRE-TRIAL PROCEEDING.

Current through End of 1998 Reg. Sess.

s 15-26-1. Conduct of pre-trial proceeding by audio-video communication device.

Whenever the law requires a defendant in a criminal case to appear before any judge or magistrate for a first or subsequent appearance, bail, arraignment, or other pre-trial proceeding, at the discretion of the court, the proceeding may be conducted by an audio-video communication device, in which case the defendant shall not be required to be physically brought before the judge or magistrate. The audio-video communication shall enable the judge or magistrate to see and converse simultaneously with the defendant or other person and operate so that the defendant and his or her counsel, if any, can communicate privately, and so that the defendant and his or her counsel are both physically present in the same place during the audio-video communication. The signal of the audio-video communication shall be transmitted live and shall be secure from interception through lawful means by anyone other than the persons communicating. Nothing herein shall be construed as affecting the defendant's right to waive counsel.
CREDIT

(Acts 1996, No. 96-732, p. 1224, s 1.)

<General Materials (GM) - References, Annotations, or Tables>

Ala. Code 1975 s 15-26-1
AL ST s 15-26-1
END OF DOCUMENT

AL ST s 15-26-2
Ala.Code 1975 § 15-26-2

CODE OF ALABAMA
TITLE 15. CRIMINAL PROCEDURE.
CHAPTER 26. AUDIO-VIDEO COMMUNICATION FOR CRIMINAL PRE-TRIAL PROCEEDING.

Current through End of 1998 Reg. Sess.

§ 15-26-2. Physical presence of defendant not required.

If the court has provided for the use of an audio-video communication system to facilitate communication between the court and the defendant during any pre-trial proceeding, the physical presence of the defendant in open court during the proceeding shall not be required.

(Acts 1996, No. 96-732, p. 1224, § 2.)

Ala. Code 1975 § 15-26-2

AL ST § 15-26-2

END OF DOCUMENT

CODE OF ALABAMA
TITLE 15. CRIMINAL PROCEDURE.
CHAPTER 26. AUDIO-VIDEO COMMUNICATION FOR CRIMINAL PRE-TRIAL PROCEEDING.

Current through End of 1998 Reg. Sess.

§ 15-26-3. Electronic filing of documents.

Any documents filed during the audio-video communication may be transmitted electronically, including but not limited to, facsimile, personal computers, host computers, other terminal devices, and local, state, and national data networks. The electronic data transmission may be served or executed by the person to whom it is sent, and returned in the same manner, and with the same force, effect, authority, and liability as an original document. All signatures on the electronic data transmission shall be treated as original signatures.

(Acts 1996, No. 96-732, p. 1224, § 3.)

Ala. Code 1975 § 15-26-3

AL ST § 15-26-3

END OF DOCUMENT

AL ST s 15-26-4
Ala.Code 1975 § 15-26-4

CODE OF ALABAMA
TITLE 15. CRIMINAL PROCEDURE.
CHAPTER 26. AUDIO-VIDEO COMMUNICATION FOR CRIMINAL PRE-TRIAL PROCEEDING.

Current through End of 1998 Reg. Sess.

§ 15-26-4. Utilization of audio-video communication by law enforcement officer.

Any law enforcement officer issuing a Uniform Traffic Ticket and Complaint or a Uniform Non-Traffic Citation and Complaint within the jurisdiction of the court may utilize audio-video communication equipment to acknowledge under oath facts alleged on the complaint. The audio-video communication shall operate in a manner which will allow the judge or magistrate and the law enforcement officer to simultaneously view and verbally communicate with each other.

(Acts 1996, No. 96-732, p. 1224, § 4.)

Ala. Code 1975 § 15-26-4

AL ST § 15-26-4

END OF DOCUMENT

CODE OF ALABAMA
TITLE 15. CRIMINAL PROCEDURE.
CHAPTER 26. AUDIO-VIDEO COMMUNICATION FOR CRIMINAL PRE-TRIAL PROCEEDING.

Current through End of 1998 Reg. Sess.

§ 15-26-5. Conduct of grand jury proceeding involving sworn police officers by audio-video communication device.

At the discretion of the district attorney, any grand jury proceeding involving sworn police officers may be conducted by an audio-video communication device. The audio-video communication shall enable the district attorney, the grand jury, and the sworn police officer to see and converse simultaneously with each other. The signal of the audio-video communication shall be transmitted live and shall be secure from interception or eavesdropping by anyone other than the persons communicating.

(Acts 1996, No. 96-732, p. 1224, § 5.)

Ala. Code 1975 § 15-26-5

AL ST § 15-26-5

END OF DOCUMENT

CODE OF ALABAMA
TITLE 15. CRIMINAL PROCEDURE.
CHAPTER 26. AUDIO-VIDEO COMMUNICATION FOR CRIMINAL PRE-TRIAL PROCEEDING.

Current through End of 1998 Reg. Sess.

§ 15-26-6. Location of television monitors.

For any proceeding which is required to be open to the public, television monitors shall be situated in the courtroom and at the place of incarceration to ensure the public, the court, and the defendant a clear view of the proceedings.

(Acts 1996, No. 96-732, p. 1224, § 6.)

Ala. Code 1975 § 15-26-6

AL ST § 15-26-6

END OF DOCUMENT

West's Ann.Cal.Penal Code § 3043.25

WEST'S ANNOTATED CALIFORNIA CODES
PENAL CODE
PART 3. OF IMPRISONMENT AND THE DEATH PENALTY
TITLE 1. IMPRISONMENT OF MALE PRISONERS IN STATE PRISONS
CHAPTER 8. LENGTH OF TERM OF IMPRISONMENT AND PAROLES
ARTICLE 3. PAROLES

Current through End of 1997-98 Reg. Sess. and 1st Ex. Sess.

§ 3043.25. Right of victim to appear at parole review hearing; audio or video statement; videoconferencing

Any victim, next of kin, or members of the victim's immediate family who have the right to appear at a hearing to review parole suitability or the setting of a parole date, either personally as provided in Section 3043, or by a written, audiotaped, or videotaped statement as provided in Section 3043.2, and any prosecutor who has the right to appear pursuant to Section 3041.7, shall also have the right to appear by means of videoconferencing, if videoconferencing is available at the hearing site. For the purposes of this section, "videoconferencing" means the live transmission of audio and video signals by any means from one physical location to another.

CREDIT(S)

1999 Electronic Update

(Added by Stats.1997, c. 902 (A.B.152), § 4.)

HISTORICAL AND STATUTORY NOTES

1999 Electronic Update

1997 Legislation

Section 5 of Stats.1997, c. 902 (A.B.152), provides:

"Funding for implementation of this act shall be contingent upon the appropriation of funds for this purpose in the Budget Act."

West's Ann. Cal. Penal Code § 3043.25

KANSAS STATUTES ANNOTATED
CHAPTER 22.–CRIMINAL PROCEDURE
KANSAS CODE OF CRIMINAL PROCEDURE
ARTICLE 32.–PROCEEDINGS BEFORE TRIAL

Current through End of 1998 Reg. Sess.

22-3205. Arraignment.

(a) Arraignment shall be conducted in open court and shall consist of reading the complaint, information or indictment to the defendant or stating to the defendant the substance of the charge and calling upon the defendant to plead thereto. The defendant shall be given a copy of the indictment or information before the defendant is called upon to plead. Except as provided in subsection (b), if the crime charged is a felony, the defendant must be personally present for arraignment; if a misdemeanor, with the approval of the court, the defendant may appear by counsel. The court may direct any officer who has custody of the defendant to bring the defendant before the court to be arraigned.

(b) Arraignment may be conducted by two-way electronic audio-video communication between the defendant and the judge in lieu of personal presence of the defendant or the defendant's counsel in the courtroom in the discretion of the court. The defendant may be accompanied by the defendant's counsel during such arraignment. The defendant shall be informed of the defendant's right to be personally present in the courtroom during arraignment. Exercising the right to be present shall in no way prejudice the defendant.

(c) The court shall ensure that the defendant has been processed and fingerprinted pursuant to K.S.A. 21-2501 and 21-2501a and amendments thereto.

History: L. 1970, ch. 129, § 22-3205; L. 1989, ch. 98, § 2; L. 1993, ch. 291, § 191; July 1.

SOURCE OR PRIOR LAWS

1995 Main Volume SOURCE OR PRIOR LAWS

62-1302, 62-1303, 62-1305, 63-301.

K. S. A. § 22-3205

KS ST § 22-3205

END OF DOCUMENT

KANSAS STATUTES ANNOTATED
CHAPTER 22.–CRIMINAL PROCEDURE
KANSAS CODE OF CRIMINAL PROCEDURE
ARTICLE 32.–PROCEEDINGS BEFORE TRIAL

Current through End of 1998 Reg. Sess.

22-3208. Pleadings and motions.

(1) Pleadings in criminal proceedings shall be the complaint, information or indictment, the bill of particulars when ordered, and the pleas of not guilty, guilty or with the consent of the court, nolo contendere. All other pleas, demurrers and motions to quash are abolished and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief.

(2) Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

(3) Defenses and objections based on defects in the institution of the prosecution or in the complaint, information or indictment other than that it fails to show jurisdiction in the court or to charge a crime may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the complaint, information or indictment to charge a crime shall be noticed by the court at any time during the pendency of the proceeding.

(4) The motion to dismiss shall be made at any time prior to arraignment or within 20 days after the plea is entered. The period for filing such motion may be enlarged by the court when it shall find that the grounds therefor were not known to the defendant and could not with reasonable diligence have been discovered by the defendant within the period specified herein. A plea of guilty or a consent to trial upon a complaint, information or indictment shall constitute a waiver of defenses and objections based upon the institution of the prosecution or defects in the complaint, information or indictment other than it fails to show jurisdiction in the court or to charge a crime.

(5) A motion before trial raising defenses or objections to prosecution shall be determined before trial unless the court orders that it be deferred for determination at the trial.

(6) If a motion is determined adversely to the defendant, such defendant shall then plead if such defendant had not previously pleaded. A plea previously entered shall stand. If the court grants a motion based on a defect in the institution of the prosecution or in the complaint, information or indictment, it may also order that the defendant be held in custody or that the defendant's appearance bond be continued for a specified time not exceeding one day pending the filing of a new complaint, information or indictment.

(7) Any hearing conducted by the court to determine the merits of any motion may be conducted by two-way electronic audio-video communication between the defendant and defendant's counsel in lieu of personal presence of the defendant and defendant's counsel in the courtroom in the discretion of the court. The defendant shall be informed of the defendant's right to be personally present in the courtroom during such hearing if the defendant so requests. Exercising the right to be present shall in no way prejudice the defendant.

History: L. 1970, ch. 129, § 22-3208; L. 1989, ch. 98, § 3; July 1.

SOURCE OR PRIOR LAWS

1995 Main Volume SOURCE OR PRIOR LAWS

LA C.Cr.P. Art. 230.1
LSA-C.Cr.P. Art. 230.1

WEST'S LOUISIANA STATUTES ANNOTATED
LOUISIANA CODE OF CRIMINAL PROCEDURE
TITLE V. ARREST

Current through all 1998 1st Ex.Sess. and Reg. Sess. Acts

Art. 230.1. Maximum time for appearance before judge for the purpose of appointment of counsel; court discretion to fix bail at the appearance; extension of time limit for cause; effect of failure of appearance

A. The sheriff or law enforcement officer having custody of an arrested person shall bring him promptly, and in any case within seventy-two hours from the time of the arrest, before a judge for the purpose of appointment of counsel. Saturdays, Sundays, and legal holidays shall be excluded in computing the seventy-two hour period referred to herein. The defendant shall appear in person unless the court by local rule provides for such appearance by telephone or audio-video electronic equipment.

B. At this appearance, if a defendant has the right to have the court appoint counsel to defend him, the court shall assign counsel to the defendant. The court may also, in its discretion, determine or review a prior determination of the amount of bail.

C. If the arrested person is not brought before a judge in accordance with the provisions of Paragraph A of this Article, he shall be released forthwith.

D. The failure of the sheriff or law enforcement officer to comply with the requirements herein shall have no effect whatsoever upon the validity of the proceedings thereafter against the defendant.

CREDIT(S)

1991 Main Volume

Added by Acts 1972, No. 700, § 1. Amended by Acts 1977, No. 395, § 1; Acts 1984, No. 206, § 1; Acts 1985, No. 955, § 1.

HISTORICAL AND STATUTORY NOTES

1991 Main Volume

The 1977 amendment rewrote par. A, which had read:

"A. The sheriff having custody of an arrested person shall bring him promptly, and in any case within one hundred forty-four hours from the time of the arrest, before a judge for the purpose of appointment of counsel. Saturdays, Sundays, and legal holidays shall be excluded in computing the one hundred forty-four hour period referred to herein. The time limit prescribed herein may be extended by written order of a judge for an additional maximum period of one hundred and forty-four hours upon a showing of good cause. The order shall state the reason for the extension and shall be communicated to the arrested person."

The 1977 amendment also, in par. C, substituted "Paragraph" for "Subsection" and deleted "unless good cause is shown" from the end of the paragraph.

The 1984 amendment inserted the third sentence in par. A.

The 1985 amendment, in both the first sentence of par. A and in par. D, inserted "or law enforcement officer" following "sheriff".

VERNON'S TEXAS STATUTES AND CODES ANNOTATED
CODE OF CRIMINAL PROCEDURE
PART I--CODE OF CRIMINAL PROCEDURE OF 1965
AFTER COMMITMENT OR BAIL AND BEFORE THE TRIAL
CHAPTER TWENTY-SEVEN--THE PLEADING IN CRIMINAL ACTIONS

Current through End of 1997 Reg. Sess.

Art. 27.18. Plea or Waiver of Rights by Closed Circuit Video Teleconferencing

(a) Notwithstanding any provision of this code requiring that a plea or a waiver of a defendant's right be made in open court, a court may accept the plea or waiver by broadcast by closed circuit video teleconferencing to the court if:

(1) the defendant and the attorney representing the state file with the court written consent to the use of closed circuit video teleconferencing;

(2) the closed circuit video teleconferencing system provides for a simultaneous, compressed full motion video, and interactive communication of image and sound between the judge, the attorney representing the state, the defendant, and the defendant's attorney; and

(3) on request of the defendant, the defendant and the defendant's attorney are able to communicate privately without being recorded or heard by the judge or the attorney representing the state.

(b) On motion of the defendant or the attorney representing the state or in the court's discretion, the court may terminate an appearance by closed circuit video teleconferencing at any time during the appearance and require an appearance by the defendant in open court.

(c) A recording of the communication shall be made and preserved until all appellate proceedings have been disposed of. The defendant may obtain a copy of the recording on payment of a reasonable amount to cover the costs of reproduction or, if the defendant is indigent, the court shall provide a copy to the defendant without charging a cost for the copy.

CREDIT(S)

1999 Electronic Update

Added by Acts 1997, 75th Leg., ch. 1014, § 1, eff. Sept. 1, 1997.

Vernon's Ann. Texas C. C. P. Art. 27.18

TX CRIM PRO Art. 27.18

END OF DOCUMENT

V.T.C.A., Government Code § 402.0213

VERNON'S TEXAS STATUTES AND CODES ANNOTATED
GOVERNMENT CODE
TITLE 4. EXECUTIVE BRANCH
SUBTITLE A. EXECUTIVE OFFICERS
CHAPTER 402. ATTORNEY GENERAL
SUBCHAPTER B. DUTIES

Current through End of 1997 Reg. Sess.

§ 402.0213. Appearance Through Videoconferencing Technology

(a) The office of the attorney general may use videoconferencing technology:

(1) as a substitute for personal appearances in civil and criminal proceedings, as approved by the court; and

(2) for any proceeding, conference, or training conducted by an employee of the office of the attorney general whose duties include the implementation of Chapter 56, Code of Criminal Procedure, and Chapter 57, Family Code.

(b) In this section, "videoconferencing technology" means technology that provides for a conference of individuals in different locations, connected by electronic means, through audio, video, or both.

(c) The attorney general shall obtain the approval of the appropriate authority overseeing a proceeding under Subsection (a)(2) before using videoconferencing technology under this section.

CREDIT(S)

1998 Main Volume

Added by Acts 1997, 75th Leg., ch. 509, § 1, eff. Sept. 1, 1997.

V. T. C. A., Government Code § 402.0213

TX GOVT § 402.0213

Code 1950, s 19.2-3.1

VIRGINIA RULES OF COURT
CRIMINAL PROCEDURE [Title 19.2, Code of Virginia]
CHAPTER 1. GENERAL PROVISIONS

Current through the 1998 Regular Session of the General Assembly

s 19.2-3.1. Personal appearance by two-way electronic video and audio communication; standards

A. Where an appearance is required or permitted before a magistrate, intake officer or, prior to trial, before a judge, the appearance may be by (i) personal appearance before the magistrate, intake officer or judge or (ii) use of two-way electronic video and audio communication. If two-way electronic video and audio communication is used, a magistrate, intake officer or judge may exercise all powers conferred by law and all communications and proceedings shall be conducted in the same manner as if the appearance were in person, and any documents filed may be transmitted by electronically transmitted facsimile process. The facsimile may be served or executed by the officer or person to whom sent, and returned in the same manner, and with the same force, effect, authority, and liability as an original document. All signatures thereon shall be treated as original signatures.

B. Any two-way electronic video and audio communication system used for an appearance shall meet the following standards:

1. The persons communicating must simultaneously see and speak to one another;

2. The signal transmission must be live, real time;

3. The signal transmission must be secure from interception through lawful means by anyone other than the persons communicating; and

4. Any other specifications as may be promulgated by the Chief Justice of the Supreme Court.

Amended by Acts 1996, c. 755; Acts 1996, c. 914.

APPLICATION

The first enactments of Acts 1996, cc. 755 and 914 amended this section. The respective seventh enactments of Acts 1996, cc. 755 and 914 are identical, and provide:

"That the provisions of this act shall apply to offenses committed and to records created and proceedings held with respect to those offenses on or after July 1, 1996."

(Added by Stats.1995, c. 367 (S.B.840), § 1. Amended by Stats.1998, c. 931 (S.B.2139), § 375, eff. Sept. 28, 1998.)

REPEAL

< This section is repealed by its own terms operative Jan. 1, 2000. >

LAW REVISION COMMISSION COMMENTS

1999 Electronic Update

1998 Amendment

Section 977.2 is amended to accommodate unification of the municipal and superior courts in a county. Cal. Const. art. VI, § 5(e). See also Section 691(f) ("felony case" defined). [28 Cal.L.Rev.Comm. Reports 51 (1998)].

HISTORICAL AND STATUTORY NOTES

1999 Electronic Update

1992 Legislation

Former § 977.2, relating to a pilot project for two-way audiovideo communication between defendant and courtroom, added by Stats.1983, c. 197, § 1, amended by Stats.1984, c. 1382, § 1; Stats.1985, c. 1125, § 1; Stats.1985, c. 1143, § 1; Stats.1986, c. 774, § 1; Stats.1989, c. 374, § 1; Stats.1990, c. 427 (A.B.3678), § 1; Stats.1990, c. 1271 (S.B.2545), § 1; Stats.1991, c. 179 (A.B.612), § 1, was repealed by Stats.1992, c. 264 (S.B.2003), § 2.)

1998 Legislation

Stats.1998, c. 931, in subd. (a)(2), inserted "in a felony case" following "initial hearing in superior court".

1985 Main Volume

The 1984 amendment rewrote the section, which previously read:

"Notwithstanding the provisions of Section 977, the Board of Supervisors of San Diego or Sacramento Counties, or both, with the approval of the presiding judge of the municipal court and in consultation with the district attorney, and the public defender, may establish a pilot project, not to exceed two years in duration, whereby the arraignment of defendants in municipal court on felony charges is conducted by two-way electronic audio-video communication between the defendant and the courtroom in lieu of the physical presence of the defendant in the courtroom. The defendant may be accompanied by his or her attorney, and may enter a plea, during such an arraignment. The defendant shall have the right to make his or her plea while physically present in the courtroom if he or she so requests. Each county conducting a pilot project pursuant to this section shall report annually to the Legislature such data, including costs, benefits, and problems incurred, as shall be specified by the Judicial Council.

"Notwithstanding any other provision of this section, a judge may order a defendant's personal appearance in court for arraignment, and shall not pursuant to this section accept a plea of guilty or no contest from a defendant not physically in the courtroom."

West's Ann. Cal. Penal Code § 977.2

CA PENAL § 977.2

END OF DOCUMENT

WEST'S ANNOTATED CALIFORNIA CODES
PENAL CODE
PART 2. OF CRIMINAL PROCEDURE
TITLE 6. PLEADINGS AND PROCEEDINGS BEFORE TRIAL
CHAPTER 1. OF THE ARRAIGNMENT OF THE DEFENDANT

Current through End of 1997-98 Reg. Sess. and 1st Ex. Sess.

§ 977.2. Incarcerated defendants; initial appearance and arraignment; two- way electronic audiovideo communications; presence of counsel

(a) The Department of Corrections may establish a three-year pilot project as follows:

(1) Notwithstanding Section 977 or any other law, in all cases in which the defendant is charged with a misdemeanor or a felony and is currently incarcerated in the state prison, the Department of Corrections may arrange for the initial court appearance and arraignment in municipal or superior court to be conducted by two-way electronic audiovideo communication between the defendant and the courtroom in lieu of the physical presence of the defendant in the courtroom. Nothing in this section shall be interpreted to eliminate the authority of the court to issue an order requiring the defendant to be physically present in the courtroom in those cases where the court finds circumstances that require the physical presence of the defendant in the courtroom.

(2) If the defendant is represented by counsel, the attorney shall be present with the defendant at the initial court appearance and arraignment, and may enter a plea during the arraignment. However, if the defendant is represented by counsel at an initial hearing in superior court in a felony case, and if the defendant does not plead guilty or nolo contendere to any charge, the attorney shall be present with the defendant or if the attorney is not present with the defendant, the attorney shall be present in court during the hearing.

(3) In lieu of the physical presence of the defendant's counsel at the institution with the defendant, the court and the department shall establish a confidential telephone and facsimile transmission line between the court and the institution for communication between the defendant's counsel in court and the defendant at the institution. In this case, counsel for the defendant shall not be required to be physically present at the institution during the initial court appearance and arraignment via electronic audiovideo communication. Nothing in this section shall be construed to prohibit the physical presence of the defense counsel with the defendant at the state prison.

(b) The pilot project shall consist of not more than five institutions and shall include, at a minimum, one maximum security institution, one institution from Imperial County, and one institution housing females.

(c) A defendant who is physically present in an institution taking part in the pilot project, but who has committed a misdemeanor or felony at an institution not subject to the pilot project, may, at the discretion of the director, be waived from having the initial appearance and arraignment conducted by two-way electronic audiovideo communication subject to the limitations provided by this section.

(d) The department shall prepare and submit a report to the Legislature on or before June 30, 1999, that includes an assessment of the costs and benefits of the pilot project and a recommendation on whether to expand the pilot project statewide.

(e) This section shall remain in effect only until January 1, 2000, and as of that date is repealed.

CREDIT(S)

1999 Electronic Update

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

September 1, 1999

MEMORANDUM TO MEMBERS OF THE SUBCOMMITTEE ON VIDEO CONFERENCING

SUBJECT: Materials for Conference Call

For your information, I have attached additional materials for our conference call on Tuesday, September 7, 1999, at 12:00 p.m. Eastern Time.

John K. Rabiej

Attachments

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

September 22, 1995

MEMORANDUM TO: Honorable D. Lowell Jensen
Professor David A. Schlueter

FROM: Paul Zingg, Attorney, Office of Judges Programs

SUBJECT: Videoconferencing in Criminal Proceedings

Several videoconferencing pilot programs are currently operating in the federal courts. John Rabiej has asked that I provide the status of the civil and criminal programs, and a summary of the advisory committee's actions regarding the proposal to amend criminal rules 10 and 43 to allow videoconferencing during arraignments and other pretrial proceedings.

Advisory Committee's Action on Criminal Rules 10 and 43

October 1992. The advisory committee reviewed a proposal from the Bureau of Prisons to provide for videoconferencing of arraignments. Judge Hodges noted that a similar proposal had been reviewed by the advisory committee and rejected at an earlier meeting. The committee voted 5 to 4 against a proposal to amend rule 10 to allow videoconferencing (without a consent provision). Judge Hodges then appointed a subcommittee to study whether to amend rules 10 and 43 to allow experimental videoconferencing with the defendant's consent.

April 1993. The subcommittee (Judge Keenan, Judge Crow, Mr. Marek, Mr. Doar, and Prof. Saltzburg) reported its discussions to the advisory committee and proposed amendments to rules 10 and 43 to allow videoconferencing when the defendant has waived the right to be physically present in court. The committee subsequently approved amendments to rule 10 (by a vote of 10 to 3) and to rule 43 (by a vote of 9 to 3 with one abstention).

October 1993. Proposed amendments to Rules 10 and 43 were circulated for public comment.

April 1994. The American Bar Association and the National Association of Criminal Defense Lawyers opposed the proposals. Two witnesses from the Federal Defender's office in North Carolina Eastern also opposed the proposals in testimony before the committee. The Bureau of Prisons and the U.S. Marshals Service supported the proposed amendments. Judge Diamond, Chairman of the Defender Services Committee, raised several objections and requested deferral pending completion of an ongoing videoconferencing pilot program. The committee voted 10 to 0 to defer any further action on rule 10, based primarily on Judge Diamond's request. It also voted to delete the videoconferencing provisions from other proposed amendments to rule 43 (in absentia sentencing).

Criminal Pilot Program

The Bureau of Prisons and the U.S. Marshals Service are funding two criminal videoconferencing projects in the Eastern District of Pennsylvania and Puerto Rico. The two districts are utilizing the technology in criminal pretrial proceedings, including arraignments. The projects have been hampered, however, by an unwillingness of the participants to consent to participate and a belief by some judges that the use of the technology is of questionable legality. Reportedly, the Bureau of Prisons and the Marshals Service are frustrated with the limited use of the technology, and are considering removing its equipment from Puerto Rico.

The District of Puerto Rico installed videoconferencing technology in the courtroom of one of its magistrate judges. The judge has used the system for several arraignments with the consent of each defendant. Most defendants are not consenting to the use of the technology, however, under advice of counsel.

The Eastern District of Pennsylvania has used its videoconferencing system on five occasions during the first two months after its installation in June 1995. Four occasions involved conferences between defense counsel and their clients; the fifth instance involved an interview of a defendant by the U.S. probation office. Under rules adopted by the court, the presiding judge must approve the use of the technology and receive the consent of the defendant and counsel to use videoconferencing in certain pretrial proceedings. The court has approved the following types of hearings for inclusion in the project:

- Bail Applications
- Appointment of counsel
- Rule 40 transfer
- Requests for substitute counsel
- Speedy Trial Act colloquies
- Discovery motions
- Continuance motions
- Other proceedings where the court wants to determine if the defendant understands the request submitted by counsel

After a request for assistance, the Federal Judicial Center agreed to assist the Bureau of Prisons and the Marshals Service in monitoring the projects and coordinating their research with the Court Administration Committee's civil projects so that similar information is obtained by each study. The Center will provide its evaluation to the Criminal Rules Committee upon completion of the project, and can be prepared to give a status report at the committee's meeting next month.

Three Judicial Conference Committees are interested in the criminal videoconferencing pilot projects in addition to the Court Administration Committee and the rules committees - the Defender Services Committee, the Criminal Law Committee, and the Automation and Technology Committee. The Federal Judicial Center has agreed to keep each committee and their staffs apprised of their progress in reviewing the criminal pilot projects.

Civil Pilot Programs

The Court Administration and Case Management Committee recently received a one year extension for three programs that have used videoconferencing in prisoner civil rights cases (Louisiana Middle, Missouri Western, and Texas Eastern). In addition, the committee has been authorized to expand the civil prisoner program to five additional districts. The committee is also evaluating a program in the bankruptcy court in the Western District of Texas to use videoconferencing to conduct bankruptcy proceedings between the district's Austin and Midland facilities.

The Committee studied a project in the Eastern District of North Carolina that allowed videoconferencing of competency hearings from the federal corrections facility at Butner for a one day period. Judge Britt issued an opinion upholding the legality of the use of the technology in a civil competency hearing. That opinion has been upheld by the 4th Circuit Court of Appeals. The Bureau of Prisons is considering whether to install equipment permanently in the district.

The Court Administration and Case Management Committee intends to submit a report and recommendations on its videoconferencing study to the Judicial Conference in March 1996. The committee reported to the Conference this month that the preliminary results from the pilot programs are "promising":

> *The courts are very pleased with the security and scheduling benefits achieved by videoconferencing prisoner civil rights hearings. A preliminary assessment of expenses incurred in two of the pilot courts indicates that videoconferencing technology can reduce the courts' on-going monthly costs for conducting such hearings. Prior to the availability of videoconferencing*

equipment, magistrate judges and court staff in both districts traveled to state correctional facilities, expending substantial productive travel time and incurring travel costs.

The Committee will review the final results of its study at its December 1995 meeting.

Related Issue - Civil Rule 43

This week, the Judicial Conference approved proposed amendments to Civil Rule 43 for transmission to the Supreme Court that would permit a witness to testify by "contemporaneous transmission" (e.g., video transmission) from a different location.

After the public comment period, the Advisory Committee on Civil Rules narrowed the proposal to allow contemporaneous transmission only on a showing of good cause in compelling circumstances. In its report to the Conference explaining the change, the committee emphasized the importance of the presence of the witness in court to encourage truthfulness, as well as the opportunity for face-to-face evaluation of demeanor. The committee also noted concerns that the absence of the physical presence of opposing counsel during the witness' testimony could lead to abuses, including improper coaching outside the view of the camera.

authorities and nothing would happen in the case. Mr. Pauley responded that the defendant's interests would be protected by *Riverside*'s requirements of a prompt appearance before a magistrate to determine if probable cause exists for pretrial confinement.

In the ensuing discussion, the Committee noted a variety of potential problems with amending Rule 5 to meet the UFAP problem. Judge Keeton noted that it might be easier to simply amend the statute to permit federal authorities to arrest a state defendant without relying upon a separate, rarely prosecuted, substantive federal crime. Several members raised the issue of jurisdiction to arrest a UFAP defendant and the most appropriate forum for complying with Rule 5. Judge Hodges thereafter appointed a subcommittee consisting of Judge Jensen (Chair), Judge Schlesinger, Magistrate Judge Crigler, Mr. Karas, and Mr. Pauley, to consider the proposed amendment and report to the Committee at its next meeting. No vote was taken on the motion to amend.

2. Rules 10 and 43, In Absentia Arraignments.

Judge Hodges provided a brief overview of a proposal from the Federal Bureau of Prisons to provide for teleconferencing arraignments and recognized the presence of Mr. Phillip S. Wise from the Bureau who would be available to answer questions from the Committee. He noted that the gist of the proposal was to provide some contact between the defendant, counsel, and the court without the necessity of the defendant's actual appearance before the court.

Judge Jensen moved to amend Rules 10 and 43 to provide for teleconferencing of arraignments. Mr. Pauley seconded the motion.

Judge Hodges observed that the proposal had been previously considered and rejected by the Committee and Mr. Marek questioned whether the proposed amendments would be limited to arraignments. Mr. Wise answered that the Bureau's preference would be that as many pretrial proceedings as possible, e.g., pretrial detention hearings, be covered. He further explained the two-way technology used in some state courts; the defendant can see the judge and the witness box and the judge can see the defendant. The defense counsel may or may not be with the defendant. Professor Saltzburg indicated that although he favored teleconferencing for arraignment, he would be opposed to such a procedure wherever evidence would be considered.

Mr. Marek expressed concern that the amendment would lead to a slippery slope and that he opposed any

teleconferencing, even for arraignments. He noted that there was a false assumption that nothing happens at an arraignment; the defendant should see the dynamics of the situation. There are significant issues to be decided at pretrial sessions, such as setting bail and determining competency of the defendant. He noted that although the Bureau of Prisons might save money by not transporting defendants to court, the court would incur additional expenses in terms of equipment and operating costs. In his view, the proponents had not made a case for overriding the important interests associated with personal appearances.

Judge Hodges indicated that it might be beneficial to treat Rules 10 and 43 separately and raised the question of whether it would make a difference if the defendant had the option of deciding to waive a personal appearance. Mr. Marek indicated that the right should not be waivable and Mr. Karas added that if a waiver provision were added, only those who could afford counsel, would appear.

A brief discussion ensued on the problems associated with prison overcrowding and the logistical problems associated with transporting defendants to court, especially in larger metropolitan areas. Judge Jensen noted that even in such areas of congestion, there is no authority under the rules for experimenting.

On a vote to amend Rule 10 to provide for teleconferencing of arraignments, the motion was defeated by a vote if five to four with one abstention. Judge Jensen thereafter withdrew his motion concerning a similar amendment to Rule 43; Mr. Pauley consented to the withdrawal.

The Committee then engaged in a brief discussion on the possibility of providing for some experimentation with teleconferencing. Mr. Eldridge indicated that it might be difficult to devise any pilot programs but would be more than willing to work with the Committee. Following a straw poll of the Committee, Judge Hodges appointed a subcommittee consisting of Judge Keenan (Chair), Judge Crow, Mr. Doar, Mr. Marek, and Professor Saltzburg. The subcommittee was directed to study the issue of amending Rules 10 and 43 to provide for experimental teleconferencing where the defendant has consented to such.

3. Rule 11, Advising Defendant of Impact of Negotiated Factual Stipulations.

Judge Hodges briefly introduced the topic of advising a defendant who is entering a guilty plea of the impact of a negotiated factual stipulation. He noted that the issue had

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.

2. Rule 29(b), Delayed Ruling on Judgment of Acquittal;
3. Rule 32, Sentence and Judgment; and
4. Rule 40(d), Conditional Release of Probationer

C. Rules Approved by the Standing Committee for Public Comment

The Committee was also informed that comments had been received on amendments which had been approved for public comment by the Standing Committee at its June 1993 meeting.

1. Rule 5(a), Initial Appearance Before the Magistrate; Exception for UFAP Defendants

The Reporter summarized the few comments received on the proposed amendment to Rule 5, which would create an exception for the prompt appearance requirement in those cases where the defendant is charged only with the offense of unlawful flight to avoid prosecution. One commentator raised the question of whether there should be a cross-reference to the proposed amendment in Rule 40 as well and another commentator writing on behalf of the American Bar Association indicated that the proposed amendment was in conflict with Section 10-4.1 of the ABA Standards for Criminal Justice. The proposed amendment was endorsed by the National Association of Criminal Defense Lawyers. Following brief discussion of the comments, Professor Saltzburg moved that the amendment be forwarded without change to the Standing Committee. Mr. Pauley seconded the motion, which carried by a vote of 9 to 2.

Mr. Pauley moved that Rule 40 be amended to reflect a cross-reference to the change in Rule 5 and Professor Saltzburg seconded the motion. The motion carried by a vote of 9 to 0 with two abstentions.

2. Rule 10, Arraignment; Video Teleconferencing.

The Reporter and Chair informed the Committee that several written comments had been received on the proposed amendment to Rule 10 which would permit arraignments by video teleconferencing, with the consent of the defendant. The American Bar Association and National Association of Criminal Defense Lawyers were opposed to the proposal, as were two witnesses who had appeared before the Committee. The Committee was also informed that Judge Diamond of the Committee on Defender Services had requested deferral of action on the proposed amendment pending completion of a pilot program on use of video teleconferencing technology in

federal courts. The United States Marshals Service expressed strong support for the amendment.

Observing that the amendment would dehumanize the trial, Professor Saltzburg moved that the Committee withdraw the amendment from further consideration. Mr. Karas seconded the motion. Several of the members of the Committee expressed concern about the fact that permitting video arraignments would probably simply shift the costs and time associated with transporting the defendant to the courthouse to the defense counsel, who would in all likelihood feel compelled to stand with his or her client. Mr. Pauley noted that approximately 80 percent of the defendants would opt to remain in the penal institution rather than being transported to court for an arraignment and that there are legitimate security concerns in moving defendants to and from court. Judge Marovich echoed that point. Judge Dowd questioned the mechanics of obtaining a waiver from the defendant and Mr. Karas expressed concern about starting down the slippery slope of permitting trial of defendants in absentia. Following additional discussion about the role of arraignments and the question of possible pilot programs which might address the Committee's concerns, Professor Saltzburg modified his motion to reflect that the Committee would defer the proposed amendment to the Committee's Spring 1995 meeting, after completion of those pilot programs. The motion to defer carried by a vote of 10 to 0 with 1 abstention.

3. Rule 43, Presence of Defendant; Video Teleconferencing

In light of the Committee's action on Rule 10, Professor Saltzburg moved that Rule 43 be approved and forwarded to the Standing Committee with the provision permitting video teleconferencing deleted. Judge Davis seconded the motion.

Mr. Pauley briefly addressed the issue of in absentia sentencing and noted that United States Attorneys have reported problems with fugitivity. He also noted a possible ambiguity in the proposed revision of Rule 43(b) and suggested language which would make it clear that in absentia proceedings may be conducted after jeopardy has attached by entry of a plea of guilty or nolo contendere. The Committee agreed with his suggestion and in a brief discussion concluded that Mr. Pauley's suggested language did not require additional public comment. The motion carried by a vote of 9 to 1 with one member abstaining.

USES OF VIDEOCONFERENCING IN THE JUDICIARY

Court Proceedings

Videoconferencing technology is being used for a variety of purposes in appellate, district and bankruptcy courts. Although originally deployed for use in prisoner matters to enhance security and reduce costs associated with travel, the technology is now being widely used both for other types of judicial proceedings and for administrative purposes. To date, there are more than eighty-five federal court sites equipped with videoconferencing.

The Judicial Conference of the United States (JCUS-MAR 96, p.14) has authorized use of the technology in prisoner civil pretrial proceedings. However, there is no judiciary-wide policy endorsing or prohibiting the use of videoconferencing in other types of judicial proceedings. Its use is subject to case law and rules considerations and the appropriateness of its use in specific proceedings is determined by judges.

In addition to the judiciary's program supporting district court use of videoconferencing for prisoner proceedings, courts have found other means of acquiring videoconferencing or are sharing the use of equipment with other court units. The judiciary is currently developing an implementation plan for courtroom technology that will include videoconferencing and will result in a broader availability of funding, particularly for new courthouses and those undergoing major renovation. Additional efforts undertaken by the judiciary to support videoconferencing include the development of a judiciary-wide procurement vehicle to simplify the purchase of equipment as well as ongoing research into this rapidly evolving technology.

Appellate Courts

In the appellate court environment, videoconferencing can be used between remote locations for oral arguments, rehearings en banc, settlement conferences, and Rule 34(f) decisions on the briefs. Travel time and costs can be saved by counsel, parties, settlement attorneys, and judges. These savings especially can be compelling in circuits that include widely dispersed geographic locations. In some circumstances, the savings realized accrue to court users rather than directly to the judiciary.

Currently, the Second and Tenth circuits are using videoconferencing for remote participation in oral arguments by attorneys, and in certain circumstances, by judges. More than 200 oral arguments have been heard by the Second Circuit through the use of videoconferencing. The use of this technology is also being explored by the Third, Fourth and Ninth circuits.

Issues of consent and fairness are less likely to arise with videoconferencing in the appellate court than in the district court. The purpose of an appellate hearing is to argue the law rather than to present evidence. Unless appearing pro se, parties do not take part in appellate court arguments. Arguments or settlement conferences are conducted by the attorneys. Moreover, the absence of witness testimony eliminates credibility concerns. In addition, appellate arguments do not include document production making it unnecessary to view

documents by camera. Legal briefs prepared by the attorneys are provided to the court in advance of the hearing. The smaller number of participants in appellate arguments and settlement conferences simplifies operational considerations in the use of videoconferencing equipment by reducing the required number of camera and monitor locations. Whether the degree of intimacy lost by videoconferencing is outweighed by savings in travel time and costs will depend on the particular circumstances of counsel and parties and the nature of the case. Judges, counsel, and parties may not be willing to opt for the use of videoconferencing when they perceive the case to be complex or critical. Issues of fairness may also preclude one counsel from arguing from a remote location while opposing counsel appears in the courtroom.

Videoconferencing offers benefits to appellate courts in the conduct of motions proceedings, Rule 34(f) decisions on the briefs, or other conferences by appellate panels. A majority of appellate cases are settled prior to argument. Videoconferencing offers savings in travel-related costs to circuit court staff attorneys, counsel, and parties when used in settlement conferences. In some circuits, where motions proceedings are routinely handled by teleconferencing, videoconferencing offers a qualitative enhancement without recourse to travel. When judges are widely separated geographically, videoconferencing offers a means of reducing non-productive travel time, reducing direct travel costs, and simplifying the scheduling of proceedings. However, the use of videoconferencing to replace face-to-face meetings may not be suitable to some circuit judges and may be contrary to accepted practices in some circuits.

District Courts

Videoconferencing is used in some state and local courts to conduct all or part of various criminal proceedings. In the federal courts, the use of videoconferencing to conduct certain types of criminal proceedings, such as arraignments and sentencing hearings, is the subject of evolving caselaw. However, videoconferencing is being used by some federal courts, with consent of the parties, for these types of proceedings. The technology is being broadly used for civil matters, particularly for preliminary hearings in prisoner civil rights complaints. At present, more than forty-five district courts are using videoconferencing for proceedings and administrative matters.

In March 1996, the Judicial Conference authorized funding for the use of videoconferencing in prisoner civil rights pretrial proceedings to district courts meeting certain caseload and related criteria based on the success of its pilot program in that area. Accordingly, the Administrative Office established the Prisoner Civil Rights Videoconferencing Project to provide a funding for equipment and assistance to courts in implementing videoconferencing programs. At present, thirty-five district courts are participating in the project with more than eighty-five separate videoconferencing sites. Participation in the project includes the requirement that costs of the program are shared with the participating state, local or federal prison authorities since not all of the benefits of using the technology accrue solely to the judiciary. While videoconferencing under this program has been used primarily to conduct prisoner civil pretrial matters, many courts have expanded its use to include other proceedings as deemed appropriate by judges, including witness testimony in trials. Courts are also using the

technology very broadly for administrative and training functions between divisional offices.

The Judicial Conference pilot program on videoconferencing in prisoner civil pretrial proceedings found that its use in this specific category of proceedings can result in significant savings in personnel costs from reduced travel time and travel costs. In some circumstances, the reduction in personnel hours expended by judges and court personnel in non-productive travel time offers measurable evidence of benefit to the court. The court can also realize significant, if less measurable, benefits from the elimination of security risks to judicial officers, court staff, and the public associated with the transport of prisoners. These security risks also include the risk of exposure to communicable diseases. State or federal prison authorities and the United States Marshals Service also recognize considerable efficiencies and costs savings through the use of videoconferencing.

Some district courts with a large number of prisoner cases found that their ability to schedule and move cases more speedily and more efficiently was enhanced by the use of videoconferencing. This was especially significant in districts where the judge and court staff previously traveled to correctional facilities to conduct pretrial hearings. It was suggested that the use of videoconferencing may improve an inmate's chance of having a hearing scheduled before a judicial officer because of the elimination of numerous scheduling difficulties and security concerns. There are, however, concerns about the fairness of videoconferencing to the parties appearing before a judge or presenting their arguments without benefit of the judge's physical presence in the hearing room. While the judges participating in the pilot felt that videoconferencing provided a fair hearing format for prisoner/plaintiffs, such concerns are likely to continue to be raised.

In 1996 the President signed into law legislation that included the Prison Litigation Reform Act. That legislation includes the requirement that federal courts "to the extent practicable," conduct prison condition pretrial proceedings "in which the prisoner's participation is required or permitted" by telephone, videoconference, or other telecommunications technology, without removing the petitioner from the prison facility. While this legislative language imposes no mandatory requirement on the courts, it certainly establishes the congressional desire that prisoners remain at the prison for pretrial civil rights proceedings.

With regard to the use of videoconferencing in civil trials, Federal Rule of Civil Procedure 43 was recently amended, effective December 1, 1996, to permit testimony at trial to be made by contemporaneous transmission from a remote location, but only "for good cause shown in compelling circumstances and upon appropriate safeguards."

Other uses of videoconferencing in district courts include pretrial and parole interviews between prisoners and pretrial services or parole officers, as well as attorney-client consultations. The Bureau of Prisons and the United States Marshals Service are conducting videoconferencing of some pretrial criminal proceedings (with the approval of the court and the consent of the parties) in the Eastern District of Pennsylvania. Usage, however, has been minimal because of

the consent requirement. Videoconferencing is also being used for criminal pretrial matters in the District of Oregon under a program supported by the United States Marshals Service. Videoconferencing of attorney-client consultations is also employed in the District of Hawaii to allow attorneys located in Hawaii to consult with their clients incarcerated in correctional facilities on the west coast under a program supported by the state bar association.

Bankruptcy Courts

The use of videoconferencing in bankruptcy courts for non-trial proceedings offers cost savings and efficiencies in a less controversial environment than in district courts, particularly in view of the numerous hearings that are required under federal bankruptcy law. More than fifteen bankruptcy courts are routinely using videoconferencing to conduct evidentiary and non-evidentiary proceedings between remote locations, saving time in travel and direct travel costs for court personnel and the bar, and allowing hearings to be scheduled more promptly and frequently in court locations without a resident bankruptcy judge. One court found that purchase of a videoconferencing system precluded the need to construct additional court space, representing a substantial savings in potential construction costs and recurring space costs.

Under a pilot conducted by the Judicial Conference, the United States Bankruptcy Court for the Western District of Texas pioneered the use of videoconferencing to conduct hearings between divisional locations four hundred miles apart. The technology resulted in savings to the court in travel costs and in the reduction of non-productive travel time. The court also found that it considerably enhanced flexibility in the scheduling of proceedings. While the bankruptcy judge prefers to hold proceedings involving complex contested matters in person, in at least one instance such a proceeding was successfully conducted by videoconferencing when last minute weather complications prevented the judge from flying to the courthouse the attorneys and parties already assembled at the remote site.

For reasons similar to those discussed above with regard to appellate courts, relating to geographic location of the judges and difficulties in scheduling, the use of videoconferencing may be well suited to proceedings before Bankruptcy Appellate Panels. These panels have become more common due to the requirements of recent legislation.

Access to Videoconferencing

It should be noted that the use of videoconferencing by federal courts does not require all participants to purchase videoconferencing equipment. Counsel, parties, and the courts can rent use of videoconferencing facilities by the hour from a variety of sources, such as "Kinko's," a national office services franchise. Equipment can also be leased on a short term basis for use in specific proceedings, although this is currently an expensive option. In some instances state or local governments and bar associations have access to videoconferencing facilities and videoconferencing networks which can be shared with federal courts. Both the United States Marshals Service and the Federal Bureau of Prisons have videoconferencing programs in

operation at numerous locations and have frequently cooperated with the federal judiciary in conducting proceedings by videoconferencing. In addition, a national videoconferencing network is being implemented by the United States Department of Justice in all United States Attorneys' offices.

Videoconferencing is an evolving technology that offers many potential uses to the federal courts. However, videoconferencing does not "replace" the physical presence of a judge. It is a tool that can, in certain compelling circumstances, enhance and supplement the services that the court provides to the public. The use of videoconferencing in judicial proceedings will continue to be conditioned by concerns for fairness to litigants consistent with the requirements set forth in statute and rules.

Prepared by the Administrative Office of the United States Courts
October 22, 1998

VIDEOCONFERENCING

a. Current Use of Videoconferencing

Federal courts continue to experiment with the use of videoconferencing for judicial proceedings and other court business. Thirty-four district courts are now participating in the Prisoner Civil Rights Videoconferencing Project, many with multiple videoconference sites within the district. Funding for seven new sites or the expansion of existing sites will be available in FY 1999. Eight additional courts are also purchasing and using videoconference equipment with funding from the Electronic Courtroom Project[1], which is also providing additional funds to many of the courts participating in the Prisoner Civil Rights Videoconferencing Project.[2]

Federal courts are now using videoconferencing extensively for prisoner pretrial matters and occasionally for inmate witness testimony in prisoner hearings and trials, with the plaintiff located at the courthouse. Although it appears that no federal courts regularly conduct criminal preliminary proceedings by videoconference, at least one judge has found that videoconferencing provides a preferable alternative for conducting sentencing proceedings. That judge reported, in conjunction with the electronic courtroom project, that, rather than monthly travel to another

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[1] The Electronic Courtroom Project is the judiciary's multi-year study of the use of four courtroom technologies: videoconferencing, video evidence presentation, electronic court-reporting methods such as real-time stenography, and courtroom access to electronic applications and databases.

[2] A list of those courts participating in the Electronic Courtroom Project and the Prisoner Civil Rights Videoconferencing Project is attached.

location to conduct sentencing hearings for fifty to sixty defendants, videoconferencing allows more frequent sentencing proceedings with fewer defendants at each hearing. The defendants consent to the use of videoconferencing in writing and on the record at the proceeding.

Some courts, particularly those in the Fifth Circuit, the most active circuit in the use of videoconferencing, have reported benefits from increasing the use of videoconferencing for administrative matters such as meetings and training. Appellate court use of videoconferencing is also expanding. Currently, the Second and Tenth Circuits use videoconferencing for appellate arguments. The Fifth and Ninth Circuits are considering such use.

State courts continue to lead in the use of videoconferencing for judicial proceedings, however, with statutes and rules providing for the use of videoconferencing for criminal proceedings in many states.

b. Proposed Amendments to the Federal Rules of Criminal Procedure

Current proposed amendments to the Federal Rules of Criminal Procedure present possibilities for expanding the use of videoconferencing in federal criminal proceedings.

In 1993, following the decision in Valenzuela-Gonzales v. United States, 915 F.2d 1276 (9th Cir. 1990), holding that Federal Rules of Criminal Procedure 10 and 43, read together, preclude the use of videoconference arraignments, the Advisory Committee on Criminal Rules proposed amendments specifically providing for videoconferencing of criminal pretrial proceedings, including arraignments. Following opposition to the amendments by the Defender Services Committee the Advisory Committee deferred consideration of the proposed amendments.

At its April 1998 meeting, the Advisory Committee considered a proposal to amend

Federal Rules of Criminal Procedure 10 and 43 to authorize a defendant to waive the right to be present at the arraignment altogether, if the defendant waives his or her right of personal appearance in writing and if the court accepts the waiver. It approved the proposed amendments, which do not directly address videoconferencing, but deferred publication of the proposed amendments for comments until a later date.

At its April 1998 meeting, the Advisory Committee also considered a proposed amendment to Criminal Rule 26 to permit taking witness testimony by remote contemporaneous video transmission in certain circumstances. The Committee deferred consideration of this amendment to allow further time for research into the Confrontation Clause issues that are implicated. Approval of the proposed amendment would signify a cautious but significant step toward expanding the use of videoconferencing in federal criminal proceedings.

Staff will continue to gather information and apprise the Committee on the use of videoconferencing in the courts.

CALL FOR COMMENT ON

PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE

FEDERAL RULES OF APPELLATE PROCEDURE

FEDERAL RULES OF BANKRUPTCY PROCEDURE

FEDERAL RULES OF CIVIL PROCEDURE

FEDERAL RULES OF CRIMINAL PROCEDURE

AND THE

FEDERAL RULES OF EVIDENCE

Public hearings will be held on the amendments to:
Appellate Rules in Denver, Colorado on March 14, 1994;
Bankruptcy Rules in Washington, D.C. on March 25, 1994;
Civil Rules in Dallas, Texas on April 6, 1994;
Criminal Rules in Los Angeles, California on April 4, 1994;
Evidence Rules in New York, New York on May 9, 1994.

COMMITTEE ON RULES OF PRACTICE
AND PROCEDURE

OF THE

JUDICIAL CONFERENCE OF THE
UNITED STATES

OCTOBER 1993

function of approving prosecutions may not be delegated.

In enacting § 1073, Congress apparently intended to provide assistance to state criminal justice authorities in an effort to apprehend and prosecute state offenders. It also appears that by requiring permission of high ranking officials, Congress intended that prosecutions be limited in number. In fact, prosecutions under this section have been rare. The purpose of the statute is fulfilled when the person is apprehended and turned over to state or local authorities. In such cases the requirement of Rule 5 that any person arrested under a federal warrant must be brought before a federal magistrate judge becomes a largely meaningless exercise and a needless demand upon federal judicial resources.

In addressing this problem, several options are available to federal authorities when no federal prosecution is intended to ensue after the arrest. First, once federal authorities locate a fugitive, they may contact local law enforcement officials who make the arrest based upon the underlying out-of-state warrant. In that instance, Rule 5 is not implicated and the United States Attorney in the district issuing the § 1073 complaint and warrant can take action to dismiss both. In a second scenario, the fugitive is arrested by federal authorities who, in compliance with Rule 5, bring the person before a federal magistrate judge. If local law enforcement officers are present, they can take custody, once the United States Attorney informs the magistrate judge that there will be no prosecution under § 1073. Depending on the availability of state or

local officers, there may be some delay in the Rule 5 proceedings; any delays following release to local officials, however, would not be a function of Rule 5. In a third situation, federal authorities arrest the fugitive but local law enforcement authorities are not present at the Rule 5 appearance. Depending on a variety of practices, the magistrate judge may calendar a removal hearing under Rule 40, or order that the person be held in federal custody pending further action by the local authorities.

Under the amendment, officers arresting a fugitive charged only with violating § 1073 need not bring the person before a magistrate judge under Rule 5(a) if there is no intent to actually prosecute the person under that charge. Two requirements, however, must be met. First, the arrested fugitive must be transferred without unnecessary delay to the custody of state officials. Second, steps must be taken in the appropriate district to dismiss the complaint alleging a violation of § 1073. The rule continues to contemplate that persons arrested by federal officials are entitled to prompt handling of federal charges, if prosecution is intended, and prompt transfer to state custody if federal prosecution is not contemplated.

Rule 10. Arraignment

Arraignment, which must ~~shall~~ be conducted in open court, and ~~shall~~ consists of:

(a) reading the indictment or information to the defendant or stating to the defendant the substance of the charge; and

(b) calling on the defendant to plead to the indictment or information ~~thereto~~.

The defendant must ~~shall~~ be given a copy of the indictment or information before being called upon to enter a plea ~~plead~~. Video teleconferencing may be used to arraign a defendant not physically present in court, if the defendant waives the right to be arraigned in open court.

COMMITTEE NOTE

Read together, Rules 10 and 43 require the defendant to be present in court for the arraignment. *See, e.g., Valenzuela-Gonzales v. United States*, 915 F.2d 1276, 1280 (9th Cir. 1990)(Rules 10 and 43 are broader in protection than the Constitution). The amendment to Rule 10, in addition to several stylistic changes, creates an exception to

that rule and provides that the court may permit arraignments through video teleconferencing if the defendant waives the right to be present in court. Similar amendments have also been made to Rule 43 to cover other pretrial sessions.

In amending the rule, and Rule 43, the Committee was very much aware of the argument that permitting video arraignments could be viewed as an erosion of an important element of the judicial process. First, it may be important for a defendant to see and experience first-hand the formal impact of the reading of the charge. Second, it may be necessary for the court to personally see and speak with the defendant at the arraignment, especially where there is a real question whether the defendant really understands the gravity of the proceedings. And third, there may be difficulties in providing the defendant with effective and confidential assistance of counsel if the two are in separate locations, connected only by audio and video linkages.

The Committee nonetheless believed that in appropriate circumstances the court, and the defendant, should have the option of conducting the arraignment where the defendant is in visual and aural contact with the court, but in a different location. Use of video technology might be particularly appropriate, for example, where an arraignment will be pro forma but the time and expense of transporting the defendant to the court are great. In some districts, defendants have to be transported long distances, under armed guard, to an arraignment which may take only minutes to complete.

A critical element to the amendment is that no matter how convenient or cost effective a video arraignment might be, the defendant's right to be present in court stands unless he or she waives that right. As with other rules including an element of waiver, whether a defendant voluntarily waived the right to be present in court during an arraignment will be measured by the same standards. An effective means of meeting that requirement in Rule 10 would be for the court to obtain the defendant's views during the arraignment itself or require the defendant to execute the waiver in writing.

Rule 43. Presence of the Defendant

(a) PRESENCE REQUIRED. The defendant ~~shall~~ must be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(b) CONTINUED PRESENCE NOT REQUIRED. The further progress of the trial to and including the return of the verdict, and the imposition of sentence,

will ~~shall~~ not be prevented and the defendant will ~~shall~~ be considered to have waived the right to be present whenever a defendant, initially present at trial,

(1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial), ~~or~~

(2) in a noncapital case, is voluntarily absent at the imposition of sentence, or

~~(2)~~(3) after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such

as to justify exclusion from the courtroom.

(c) PRESENCE NOT REQUIRED. A defendant need not be present ~~in the following situations~~:

(1) ~~A corporation may appear by counsel for all purposes.~~ when represented by counsel and the defendant is an organization, as defined in 18 U.S.C. § 18;

(2) ~~In prosecutions for offenses~~ when the offense is punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence;

(3) At when the proceeding involves only a conference or ~~argument~~ hearing upon a question of law;

(4) when the proceeding is a pretrial session in which the defendant can participate through video teleconferencing and waives the right to be present in court; or

~~(4)~~ (5) ~~At~~ when the proceeding involves a correction ~~reduction~~ of sentence under Rule 35.

COMMITTEE NOTE

The revisions to Rule 43 focus on three areas and reflect in part similar changes in Rule 10, which governs arraignments. First, the amendments make clear that a defendant who, initially present at trial but who voluntarily flees before sentencing, may nonetheless be sentenced in absentia. Second, the court may use video technology to conduct pretrial sessions with the defendant absent from the courtroom, where the defendant waives the right to be present. Third, the rule is amended to extend to

organizational defendants. In addition, some stylistic changes have been made.

Subdivision (a). The changes to subdivision (a) are stylistic in nature and the Committee intends no substantive change in the operation of that provision.

Subdivision (b). The changes in subdivision (b) are intended to remedy the situation where a defendant voluntarily flees before sentence is imposed. Without the amendment, it is doubtful that a court could sentence a defendant who had been present during the entire trial but flees before sentencing. Delay in conducting the sentencing hearing under such circumstances may result in difficulty later in gathering and presenting the evidence necessary to formulate a guideline sentence.

The right to be present at court, although important, is not absolute. The caselaw, and practice in many jurisdictions, supports the proposition that the right to be present at trial may be waived through, inter alia, the act of fleeing. *See generally Crosby v. United States*, 113 S.Ct. 748, ____ U.S. ____ (1993). The amendment extends only to noncapital cases and applies only where the defendant is voluntarily absent after the trial has commenced. The Committee envisions that defense counsel will continue to represent the interests of the defendant at sentencing.

The words "at trial" have been added at the end of the first sentence to make clear that the trial of an absent defendant is possible only if the defendant was previously

present at the trial. *See Crosby v. United States, supra.*

Subdivision (c). There are two changes to subdivision (c). The first is technical in nature and replaces the word "corporation" with a reference to "organization," as that term is defined in 18 U.S.C. § 18 to include entities other than corporations.

The second change to subdivision (c) is more significant. New subdivision (c)(4), which parallels a similiar amendment in Rule 10, provides that the court may use video teleconferencing technology to conduct pretrial sessions with the defendant at another location -- if the defendant waives the right to be personally present in court. The Committee balanced the concern that this might dehumanize the judicial process against the fact that some pretrial sesssions can be very brief, pro forma proceedings. As noted above, the right to be present in court is not an absolute right, and may be voluntarily waived by the defendant. It is important to note that the amendment does not require the court to use such technology; the rule simply recognizes that the court may, under appropriate conditions, and in full respect of the defendant's rights, use such technology.

Although the Committee did not attempt to further define the term "pretrial sessions," the rule could logically extend to sessions such as Rule 5 proceedings, arraignments (as specifically provided for in the amendment to Rule 10), preliminary examinations under Rule 5.1, competency hearings, pretrial conferences, and motions hearings not already within the purview of

subdivision (c)(3). The Committee does not contemplate that the amendment would extend to guilty plea inquiries under Rule 11(c).

Rule 53. Regulation of Conduct in the Court Room

The taking of photographs in the court room during the progress of judicial proceedings or ~~radio~~ broadcasting of judicial proceedings from the court room ~~shall~~ must not be permitted by the court except as such activities may be authorized under guidelines promulgated by the Judicial Conference of the United States.

COMMITTEE NOTE

The amendment to Rule 53 marks a shift in the federal courts' regulation of cameras in the court room and the broadcasting of judicial proceedings. The change does not require the courts to permit such activities in criminal cases. Instead, the rule authorizes the Judicial Conference to do so under whatever guidelines it deems appropriate.

The debate over cameras in the court room has subsided due to several developments in the last decade. First, the Supreme Court's decision in *Chandler v. Florida*, 448

U.S. 560 (1981) made clear that it is not a denial of due process to permit cameras at criminal trials. Second, a large majority of the state courts now permit photographic and broadcasting coverage of criminal trials, without significant interruption in the proceedings or adverse impact on the participants. Third, developments in video and audio technology have enabled coverage of judicial proceedings to be accomplished with little or no interruption; some courts have adopted rules requiring pooling of coverage, which seems to even further reduce the likelihood of disruption.

In 1990 the Judicial Conference approved a three-year pilot program with audio coverage and photographic coverage of civil proceedings in selected trial and appellate courts. The Conference declined to apply the program to criminal proceedings -- because of the absolute ban of such activities in Rule 53.

In adopting the amendment the Committee was persuaded, in part, by the fact that despite the wide, and almost common, presence of cameras in court rooms there has not been a long list of complaints or a parade of horrible experiences. To the contrary, the Committee believed that judicial decorum might be enhanced if the media is able to observe, and record, the proceedings from a location outside the court room. The Committee also recognized that the criminal justice system might be better understood, and appreciated, if criminal proceedings are made readily available to the public at large. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980)(vital role of print and electronic media as surrogates

for the public supports opening of courts to audio and camera coverage).

Rule 57. Rules by District Courts

(a) IN GENERAL.

(1) Each district court ~~by action of~~ acting by a majority of the its district the judges thereof may from ~~time to time~~, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice ~~not inconsistent these rules~~. A local rule must be consistent with -- but not duplicative of -- Acts of Congress and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

(2) A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose

rights because of a negligent failure to comply with the requirement.

(b) PROCEDURE WHEN THERE IS NO CONTROLLING LAW. A judge may regulate practice in any manner consistent with federal law, these rules, and local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

(c) EFFECTIVE DATE AND NOTICE. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the

circuit in which the district is located. Copies of the rules and amendments so made by any district court ~~shall~~ must upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts and ~~shall~~ must be made available to the public. ~~In all cases not provided for by rule, the district judges and magistrate judges may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.~~

COMMITTEE NOTE

Subdivision (a). This rule is amended to reflect the requirement that local rules be consistent not only with the national rules but also with Acts of Congress. The amendment also states that local rules should not repeat national rules and Acts of Congress.

The amendment also requires that the numbering of local rules conform with any numbering system that may be prescribed by the Judicial Conference. Lack of uniform

numbering might create unnecessary traps for counsel and litigants. A uniform number system would make it easier for an increasingly national bar to locate a local rule that applies to a particular procedural issue.

Paragraph (2) is new. Its aim is to protect against loss of rights in the enforcement of local rules relating to matters of form. For example, a defendant should not be deprived of the right to waive a jury trial because counsel has negligently failed to follow local rules of form which are used to effect the waiver. The proscription of paragraph (2) is narrowly drawn -- covering only violations attributable to negligence and only those involving local rules directed to matters of form. It does not limit the court's power to impose substantive penalties upon a party if it or its attorney stubbornly or repeatedly violates a local rule, even one involving merely a matter of form. Nor does it affect the court's power to enforce local rules that involve more than mere matters of form -- for example, a local rule requiring that the defendant waive a jury trial within a specified time.

Subdivision (b). This rule provides flexibility to the court in regulating practice when there is no controlling law. Specifically, it permits the court to regulate practice in any manner consistent with Acts of Congress, with rules adopted under 28 U.S.C. § 2072, and with the district's local rules. This rule recognizes that courts rely on multiple directives to control practice. Some courts regulate practice through the published Federal Rules

and the local rules of the court. Some courts also have used internal operating procedures, standing orders, and other internal directives. Although such directives continue to be authorized, they can lead to problems. Counsel or litigants may be unaware of the various directives. In addition, the sheer volume of directives may impose an unreasonable barrier. For example, it may be difficult to obtain copies of the directives. Finally, counsel or litigants may be unfairly sanctioned for failing to comply with a directive. For these reasons, the amendment disapproves imposing any sanction or other disadvantage on a person for noncompliance with such an internal directive, unless the alleged violator has been furnished in a particular case with actual notice of the requirement.

There should be no adverse consequence to a party or attorney for violating special requirements relating to practice before a particular judge unless the party or attorney has actual notice of those requirements. Furnishing litigants with a copy outlining the judge's practices -- or attaching instructions to a notice setting a case for conference or trial -- would suffice to give actual notice, as would an order in a case specifically adopting by reference a judge's standing order and indicating how copies can be obtained.

Rule 59. Effective Date; Technical Amendments

(a) These rules take effect on the day which is 3 months subsequent to the

adjournment of the first regular session of the 79th Congress, but if that day is prior to September 1, 1945, then they take effect on September 1, 1945. They govern all criminal proceedings thereafter commenced and so far as just and practicable all proceedings then pending.

(b) The Judicial Conference of the United States may amend these rules to correct errors in spelling, cross-references, or typography, or to make technical changes needed to conform these rules to statutory changes.

COMMITTEE NOTE

The rule is amended to enable the Judicial Conference to make minor technical amendments to these rules without having to burden the Supreme Court and Congress with reviewing such changes. This delegation of authority will relate only to uncontroversial, nonsubstantive matters.

**PRELIMINARY DRAFT
OF PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF EVIDENCE***

Rule 1102. Technical and Conforming Amendments

(a) Amendments to the Federal Rules of Evidence may be made as provided in section 207[illegible] of title 28 of the United States Code.

(b) The Judicial Conference of the United States may amend these rules to correct errors in spelling, cross-references, or typography, or to make technical changes needed to conform these rules to statutory changes.

COMMITTEE NOTE

This rule is added to enable the Judicial Conference to make minor technical amendments to these rules without having to burden the Supreme Court and Congress with reviewing such changes. This delegation of authority will relate only to uncontroversial, nonsubstantive matters.

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*New matter is underlined; matter to be omitted is lined through.

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Rule 12.2; Finalizing Substantive and Style Changes

DATE: September 8, 1999

For the last several meetings the Committee has discussed substantive amendments to Rule 12.2. As noted in previous memos, those amendments address three areas: First, they would require a defendant to give notice of an intent to introduce expert testimony in a capital case sentencing proceeding. Second, the proposed amendment would authorize the trial court to order a defendant, who had provided such notice, to undergo a compelled mental examination. Third, the proposal would place some limits on the ability of the government to see the results of the examination before the penalty phase had begun.

At the April 1999 meeting in Washington, DC the Committee generally agreed on language to accomplish those amendments, but deferred a final decision pending some additional discussion (and input from Judge Carnes) on the issue of when disclosure of the sanity report should take place.

More recently, the Style Subcommittee has proposed some style suggestions to the draft resulting from the April meeting. That draft is attached.

Rule 12.2. Notice of Insanity Defense or Expert Testimony ~~of~~ on Defendant's Mental Condition

* * * * *

(b) EXPERT TESTIMONY OF DEFENDANT'S MENTAL CONDITION. If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon (1) the issue of guilt or (2) the issue of punishment in a capital case, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(c) MENTAL EXAMINATION OF DEFENDANT.

(1) *Authority to Order Examination; Procedures.* If the defendant provides notice under subdivision (a) ~~In an appropriate case~~ the court ~~may~~ must, upon motion of the attorney for the government, order the defendant to submit to an examination conducted pursuant to 18 U.S.C. ~~4241 or~~ 4242. If the defendant provides notice under subdivision (b) the court may, upon motion of the attorney for the government, order the defendant to submit to an examination conducted pursuant to procedures as ordered by the court.

(2) *Disclosure of Results of Examination.* The results of the examination conducted solely pursuant to notice under subdivision (b)(2) shall be sealed and not disclosed to any attorney for the government or the defendant unless and until the defendant is found guilty of one or more capital crimes and the defendant

confirms his or her intent to offer mental condition evidence during sentencing proceedings.

(A) The results of the examination may be disclosed earlier to the defendant upon good cause shown.

(B) If early disclosure is made to the defendant, similar disclosure must be made to the attorney for the government.

(3) Disclosure of Statements by the Defendant No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony.

COMMITTEE NOTE

The changes to Rule 12.2 are designed to address three issues. First, the amendment clarifies that Rule 12.2(c) authorizes a trial court to order a mental examination for a defendant who has indicated an intention to raise a defense of mental condition bearing on the issue of guilt. The second amendment relates to a requirement that the defendant provide notice of an intent to present evidence of his or her mental condition during a capital sentencing proceeding. And finally, the amendments address the ability of the trial court to order a mental examination for a defendant who has given notice of an intent to present evidence of his or her mental condition during sentencing and when the results of that examination may be disclosed.

Subdivision (b). Under current subdivision (b), a defendant who intends to offer expert testimony on the issue of his or her mental condition on the question of guilt must provide pretrial notice of that intent. The amendment extends that notice requirement to a defendant who intends to offer expert testimony on his or her mental condition during a capital sentencing proceeding. As several courts have recognized, the better practice is to require pretrial notice of that intent so that any mental examinations can be conducted without unnecessarily delaying capital sentencing proceedings. *See, e.g., United States v. Beckford*, 962 F. Supp. 748, 754-764 (E.D. Va. 1997); *United States v. Haworth*, 942 F. Supp. 1406, 1409 (D.N.M. 1996). The amendment adopts that view.

Subdivision (c). The change to subdivision (c) clarifies the authority of the court to order mental examinations for a defendant. As currently written, the trial court has the authority to order a mental examination of a defendant who has indicated under subdivision (a) that he or she intends to raise the defense of insanity. Indeed, the corresponding statute, 18 U.S.C. § 4242 indicates that the court must order an examination if the defendant has provided notice of an intent to raise that defense and the government moves for the examination. The amendment conforms subdivision (c) to that statute. And any examination conducted on the issue of the insanity defense would thus be conducted in accordance with the procedures set out in the statutory provision.

While the authority of a trial court to order a mental examination on a defendant who has registered an intent to raise the insanity defense seems clear, the authority to order an examination on a defendant who intends only to present expert testimony on his or her mental condition on the issue of guilt is not so clear. Some courts have concluded that a court may order such an examination. *See, e.g., United States v. Stackpole*, 811 F.2d 689, 697 (1st Cir. 1987); *United States v. Buchbinder*, 796 F.2d 910, 915 (1st Cir. 1986); and *United States v. Halbert*, 712 F.2d 388 (9th Cir. 1983). In *United States v. Davis*, 93 F.3d 1286 (6th Cir. 1996), however, the court in a detailed analysis of the issue concluded that the district court lacked the authority to order a mental examination on a

defendant who had provided notice of an intent to offer evidence, inter alia, on a defense of diminished capacity. The court noted first, that the defendant could not be ordered to undergo commitment and examination under 18 U.S.C. 4242, because that provision relates to situations where the defendant intends to rely on the defense of insanity. The court also rejected the argument that examination could be ordered under Rule 12.2(c) because this was, in the words of the rule "an appropriate case." The court concluded, however, that the trial court had the inherent authority to order such an examination.

The amendment is intended to make it clear that the authority of a court to order a mental examination under Rule 12.2(c) explicitly extends to those cases where the defendant has provided notice, under Rule 12.2(b), of an intent to present expert testimony on his or her mental condition, either on the merits or at capital sentencing. *See, e.g., United States v. Hall*, 152 F.3d 381 (5th Cir. 1998).

The amendment to Rule 12.2(c) is not intended to limit or otherwise change the authority, which a court might have, either by statute or under its inherent authority, to order other mental examinations.

The amendment also addresses the question of what procedures should be used for a court-ordered examination. As currently stated in the Rule, if the examination is being ordered in connection with the defendant's stated intent to present an insanity defense, the procedures are dictated by 18 U.S.C. § 4242. On the other hand, if the examination is being ordered in conjunction with a stated intent to present expert testimony on the defendant's mental condition (not amounting to a defense of insanity) either at the guilt or sentencing phases, no specific statutory counterpart is available. Accordingly, the court is given the discretion to specify the procedures to be used. In doing so, the court may certainly be informed by other provisions, which address hearings on a defendant's mental condition. *See, e.g.*, 18 U.S.C. 4241, et. seq.

The final changes address the question of when the results of an examination ordered under Rule 12.2(b)(2), may, or must, be disclosed. The courts, which have addressed the issue generally, recognize that use of a defendant's statements made during a court-ordered examination may compromise the defendant's right against self-incrimination. *See, e.g., Estelle v. Smith*, 451 U.S. 454 (1981) (defendant's privilege against self-incrimination violated where he was not advised of right to remain silent during court-ordered examination and prosecution introduced statements during capital sentencing hearing). But subsequent cases have indicated that where the defendant has decided to introduce expert testimony on his or her mental condition, the courts have found a waiver of the privilege. *See, e.g., Powell v. Texas*, 492 U.S. 680, 683-684 (1989); *Buchanan v. Kentucky*, 483 U.S. 402, 421-424 (1987); *Presnell v. Zant*, 959 F.2d 1524, 1533 (11th Cir. 1992); *Williams v. Lynaugh*, 809 F.2d 1063, 1068 (5th Cir. 1987); *United States v. Madrid*, 673 F.2d 1114, 1119-1121 (10th Cir. 1982). That view is reflected in Rule 12.2(c) which indicates that the statements of the defendant may be used

against the defendant only after the defendant has introduced testimony on his or her mental condition. What the current rule does not address is the issue of when, and to what extent, the prosecution may see the results of the examination, which may include the defendant's statements, where evidence of the defendant's mental condition is being presented solely at a capital sentencing proceeding.

The proposed change adopts the procedure used by some courts to seal or otherwise insulate the results of the examination until it is clear that the defendant will introduce expert testimony about his or her mental condition at a capital sentencing hearing, i.e., after a verdict of guilty on one or more capital crimes. *See, e.g., United States v. Beckford*, 962 F. Supp. 748 (E.D.Va. 1997). Most courts that have addressed the issue have recognized that if the government obtains early access to the accused's statements, it will be required to show that it has not made any derivative use of that evidence. Doing so, can consume time and resources. See *See, e.g., United States v. Hall*, 152 F.3d 381, 398 (5th Cir. 1998) (noting that sealing of record, although not constitutionally required, "likely advances interests of judicial economy by avoiding litigation over [derivative use issue]." At the same time, the Committee believed that there might be instances where there may be sound reasons for releasing the results before the verdict to the defendant. Under the amendment, the defendant may request early release of the results of the examination, on good cause shown. If the defense obtains the results of the examination, then similar disclosure also must be made to the government to permit it to adequately prepare for sentencing issues.

Rule 12.2. Notice of Insanity Defense or Expert Testimony of ~~on~~ Defendant's Mental Condition

* * * * *

(b) EXPERT TESTIMONY OF DEFENDANT'S MENTAL CONDITION. If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing ~~upon (1)~~ on either the issue of guilt or ~~(2)~~ the issue of punishment in a capital case, the defendant shall ~~within~~ the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of ~~such~~ this intention and file a copy of ~~such~~ the notice with the clerk. The court may for cause ~~shown~~ allow late filing of the notice or grant additional time to the parties to prepare for trial or make ~~such~~ any other appropriate order ~~as may be appropriate~~.

(c) MENTAL EXAMINATION OF DEFENDANT.

(1) *Authority to Order Examination; Procedures.* If the defendant provides notice under subdivision (a) ~~In an appropriate case~~ the court ~~may~~ must, upon ~~motion of the attorney for~~ the government, a motion order the defendant to submit to an examination conducted ~~pursuant to~~ under 18 U.S.C. 4241 ~~or~~ 4242. If the defendant provides notice under subdivision (b) the court may, upon motion of the government's ~~attorney for the government~~, order the defendant to submit to an examination conducted ~~pursuant to~~ under procedures ~~as~~ ordered by the court.

(2) *Disclosure of Results of Examination.* The results of the examination conducted solely ~~pursuant to notice~~ under subdivision (b)(2) shall be sealed and not disclosed to any attorney for the government or the defendant unless ~~and until~~

the defendant is found guilty of one or more capital crimes and the defendant confirms his or her intent to offer mental-condition evidence during sentencing proceedings.

(A) The results of the examination may be disclosed earlier to the defendant ~~upon~~ for good cause ~~shown~~.

(B) If early disclosure is made to the defendant, similar disclosure must be made to the attorney for the government.

(3) Disclosure of Statements by the Defendant. No statement made by the defendant in the course of any examination provided for by this rule, (whether the examination ~~be~~ is with or without the consent of the defendant), no testimony by the expert based ~~upon such~~ on the statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony.

U.S. Department of Justice

Criminal Division

Washington, DC 20530-0001

May 17, 1999

MEMORANDUM

To: Henry Martin

From: Laird Kirkpatrick and Roger Pauley

Re: Rule 12.2

You will recall that the Committee directed us to continue our discussions on outstanding issues regarding Rule 12.2 and report back on areas of agreement and disagreement. The following represents our understanding of the unresolved issues and includes our position on each.

1. The draft Rule as regards capital cases (it also addresses another issue not here relevant) deals with three matters, on two of which there is a consensus. The proposed amendments would (1) require a defendant who intends to rely on expert evidence at the sentencing phase in a capital case to give pretrial notice of this intent and (2) once such notice is given, would permit the court, upon the government's request, to order the defendant to undergo a mental examination by an examiner selected by the government. These two aspects of the proposal are consistent with prevailing federal practice in the relatively few cases that have arisen, and it is our understanding there is no dispute with regard to them.

In our view, the proposed amendments could profitably end there and not attempt to resolve the third matter, which is more difficult, about which no prevailing practice yet exists, and surrounding which most or all of the remaining controversy centers. That issue concerns the timing of the disclosure of the results of the court-ordered mental examination to the government and the defendant.

The current draft sets forth a general rule that the results of the examination will be sealed until the defendant is found guilty and reaffirms his or her intent to rely on expert evidence regarding mental condition at the sentencing phase. The draft provides that the results will then be disclosed to all parties.

In addition, the draft provides that earlier disclosure may be made to the defendant for "good cause shown" and that, if such disclosure occurs, the government must simultaneously be afforded like disclosure.

No provision is made under the proposal for earlier disclosure at the behest of the government, nor is any provision made for access by the government to the reports of the defendant's experts.

A. At the meeting, you proposed that, if the court allowed the defendant earlier disclosure, it should not be required simultaneously to make disclosure to the government but rather should have discretion to do so. We continue to oppose this idea. The draft rule is already somewhat imbalanced with regard to disclosure of the government expert's report. Allowing the defendant to have access to that report *before* the government would exacerbate the imbalance. It would confer on defendants a huge advantage and would permit defendants to tailor their own presentation on the issue of mental condition to meet the anticipated response by the government's expert. This would be unfair. If the overriding concern (based presumably on Fifth Amendment considerations about potential improper use) is to prevent the government from any access to its own expert's report before the verdict and reaffirmation by the defendant of the intention to offer expert evidence of mental condition at sentencing, the Department could accept a Rule that flatly barred either side from access prior to verdict.

B. While we do not at this juncture seek earlier-than-verdict access by the government to the report of its own expert, even for "good cause shown," we do believe that – if the Rule is to deal with the timing of the parties' access to the mental examination reports – it should also specify that the government must get access to the defendant's experts' reports in time to permit reasonable preparation for the sentencing phase. The court's order in the **Beckford** case, which the proposed Rule basically uses as a model, clearly provided that the government would have access to the defense reports immediately after the defendant confirmed an intent to rely on expert testimony at sentencing. The proposed Rule should also so state. To do so, a new sentence should be added at the end of (c)(2) as follows: "Upon the defendant's confirmation of such intent, the results of any examination conducted by an expert whose evidence the defendant intends to introduce must be disclosed to the government attorney."

Again, we believe the Committee need not resolve these difficult issues and could limit the scope of the Rule to just the two consensus matters described above, leaving to caselaw development all questions concerning the timing of the parties' access to each side's expert mental examination reports.

2. Two further issues remain which must be addressed. Professor Stith has queried whether existing 12.2(c), which presently is not proposed to be amended, should be modified to permit introduction of the defendant's statements at sentencing during a court-ordered mental examination in a capital case only when the defendant has introduced "expert" evidence on mental condition (not merely any evidence on the issue, as the Rule presently provides for purposes of the government's introduction of the defendant's statements acquired via court-ordered mental examination on the issues of insanity or mental condition bearing upon guilt). She is apparently concerned that, if the defendant at sentencing, notwithstanding having noticed an intent to rely on expert evidence of mental condition, does not do so but instead merely relies on lay witness evidence or such things as school reports of the defendant's apparently aberrant behavior, the government should not be able to put on its expert in reply.

From E-mail correspondence, we glean that Professor Stith believes there is a distinction between the existing trial situations that 12.2(c) presently addresses and capital sentencing proceedings with respect to mental condition evidence in that at sentencing some evidence of mental condition will virtually always be presented by the defendant, whereas at trial if mental condition evidence is offered by the defendant on the issue of his sanity or ability to form the requisite intent for conviction, such evidence will always (or almost always) be in the form of expert testimony.

In our view, there is some merit to this position but we are also concerned that, if (c) were modified to require the introduction by the defendant *at sentencing* of expert testimony, there would be an opportunity for unfair practice. The defendant, having introduced extensive expert testimony on the issue of mental condition at trial, could refrain from such introduction at sentencing, albeit reminding the jury of the testimony through closing argument, and thereby prevent the government from putting on its expert in rebuttal. We therefore believe that, if 12.2(c) is amended to trigger the government's use of defendant's statements to situations in which the defendant at sentencing offers expert testimony, it must include also situations in which expert testimony was offered at trial and is relied upon (though not placed in evidence) by the defendant at sentencing. We also submit that, to take account of instances in which only the expert's report but not his "testimony" is introduced, the "except" clause in 12.2(c) should refer to the introduction of "evidence" rather than "testimony." In sum, we could accept an amendment of the final clause of Rule 12.2(c)(3)[currently 12.2(c)] as follows: "except on an issue respecting mental condition on which the defendant (i) has introduced evidence after notice under subdivision (a) or (b)(1), or (ii) has introduced expert evidence after notice under subdivision (b)(2) or intends to rely on expert evidence after such notice that was introduced at trial."

3. Lastly, a conforming amendment must be made to Rule 12.2(d). This rule now provides: "If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's guilt." In order to make this appropriate sanction applicable at sentencing, the words "or punishment" must be added after "guilt." In addition, if the change we suggest above from "testimony" to "evidence" is made in subdivision (c), that same change should be made here.

We would appreciate your response to this memorandum, indicating areas of agreement or disagreement, so that the Committee can better focus on the outstanding issues. If you think a telephone call would be of assistance in resolving any of the issues, we are certainly amenable to that as well.

CC: Judge Davis, Judge Carnes, Professor Schlueter, Professor Stith, John Rabiej

II-C-3

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposed Amendments to Rule 41**

DATE: **September 8, 1998**

Attached are memos from the Department of Justice: The first is from Mr. James Robinson asking the Committee to considering an amendment to Rule 41 to permit certain covert entries for the purpose of observing criminal activity. That memo includes suggested amending language. As noted in the attached article, a similar amendment has been presented for Congressional consideration.

The second memo is from Mr. Roger Pauley to Judge Tommy Miller, seeking information on whether magistrate judges believe that an amendment to Rule 41 should address warrants for tracking devices.

Both of these items are on the agenda for brief discussion at the October meeting in Williamsburg.

RAP COPY

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J

U. S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

September 2, 1999

The Honorable W. Eugene Davis
United States Circuit Judge
556 Jefferson Street, Suite 300
Lafayette, Louisiana 70501

Dear Judge Davis:

I am writing to request that the Advisory Committee on Criminal Rules consider an amendment to Rule 41(d), F.R.Crim.P., to better address a type of search of premises which the Rule does not appear at present to contemplate.

In recent years, federal law enforcement agents have found it useful in the course of criminal investigations pursuant to a warrant based on probable cause to make a covert entry of premises, not to seize property but to observe (and possibly photograph) them, or to take a sample of some suspicious substance observed therein for testing. Such a search is often of great utility in confirming information in the possession of law enforcement, and thus in determining whether and by what means to continue an investigation. For example, law enforcement agents may have probable cause to believe that a laboratory for manufacturing illegal drugs is situated at a particular location, but wish to confirm that through a search and visual observation before deciding whether and how to pursue the investigation. Or agents having probable cause to believe that conspirators are using certain premises to plan future crimes may wish to inspect those premises covertly in order to ascertain whether, and if so at which specific places, listening or video surveillance equipment could later be inserted pursuant to another warrant.

Currently, Rule 41 is not well crafted to deal with these kinds of covert entry for-purposes-of-observation searches although the only two circuits to have considered the questions surrounding such searches have upheld them provided that certain procedures, not now enumerated in the Rule, are followed with respect to giving subsequent notice of the search. Our proposal

would essentially codify the holdings of these courts.

Rule 41(a) on its face recognizes the possibility of a "search of property" with no requirement that the purpose be to seize anything, but the remainder of the Rule deals only with traditional searches in which the objective is the seizure of some property. Of critical importance is the absence of any express requirement in Rule 41 that subsequent notice be given of the fact that a covert entry and search was ever undertaken. Rule 41(d), which deals with the execution and return on a search warrant, addresses only the situation in which property is seized pursuant to the warrant and provides for the leaving of a copy of the warrant and an inventory of the items taken either with a person present or at the premises searched.

Clearly, in the case of a covert entry for-purposes-of-observation type search, immediate notice of the fact of the entry and search would defeat its purpose. Two circuits have upheld the lack of giving of immediate notice, but have held that notice must be given within seven days of the search, unless the government makes an ex parte showing of need for further delay. United States v. Freitas, 800 F.2d 1451, 1455-6 (9th Cir. 1986); United States v. Freitas, 856 F.2d 1425 (9th Cir. 1988); United States v. Villegas, 899 F.2d 1324, 1336-8 (2d Cir. 1990); United States v. Pangburn, 983 F.2d 449 (2d Cir. 1993). The two courts of appeals have differed in their identification of the source of the requirement for post-search notice. The Ninth Circuit believes the requirement stems from the Fourth Amendment, while the Second Circuit finds the requirement to be implicit in Rule 41 itself rather than the Constitution. See Pangburn, supra, 983 F.2d, at 454-5.

This jurisprudential distinction has some practical significance, although not in terms of how the Rule should be amended. The Ninth Circuit, applying the reasonable good faith exception to the exclusionary rule, has heretofore upheld the admissibility of evidence obtained from these kinds of searches, despite the lack of timely subsequent notice. Accord, United States v. Ludwig, 902 F. Supp. 121, 126 (W.D. Tex. 1995). But the court has warned that "good faith" will no longer be assertable for searches of this type that occur after the court's ruling that post-search notice is constitutionally mandated. See United States v. Johns, 948 F.2d 599, 605-6 (9th Cir. 1991), cert. denied, 505 U.S. 1226 (1992). By contrast, the Second Circuit has stated that suppression is not required for violations of its Rule 41-rooted notice requirement absent proof of prejudice or a deliberate disregard of the Rule. Pangburn supra at 455.

We urge that Rule 41 be amended to codify the holdings of the Second and Ninth Circuits that there be a requirement in searches of this kind that, within seven days thereafter, notice of the search be given unless the government obtains an order within that period for a further delay for good cause shown.

Codifying the case law will accomplish several useful goals. First, it will serve to bring Rule 41 in line with current legal developments; second, it will inform federal prosecutors and law enforcement agents both in the Second and Ninth Circuits and elsewhere, who are unaware of the present case law requirements for post search notice when seeking warrants for covert entry for-purpose-of observation searches, thereby making violations less frequent or likely; and third, it may encourage the use of these kinds of warrants by law enforcement in districts and areas of the country in which such searches and warrants are not now being utilized, either because of ignorance of the possibility thereof or uncertainty as to the procedures involved.

Specifically, we recommend that Rule 41(d) be amended by adding at the end the following.

> In the case of a warrant authorizing a search of property pursuant to a covert entry for the purpose only of observation (including the taking of photographs and the collection of samples of possible contraband or evidence), a copy of the warrant shall within seven days of the execution thereof be delivered by the government to the person whose property was searched or left at the property. Upon motion of an attorney for the government filed within seven days of the search the federal magistrate judge for good cause shown may extend the time, for not to exceed sixty days, for the providing of such warrant, and may on a like basis approve further such extensions.

Your and the other Committee members' consideration of this matter is appreciated.

Sincerely,

James K. Robinson

James K. Robinson
Assistant Attorney General

INCLUDING COVER SHEET

U.S. Department of Justice

Criminal Division

Washington, DC 20530-0001

July 15, 1999

MEMORANDUM

To: Honorable Tommy E. Miller

From: Roger A. Pauley RAP

Re: Tracking Device Warrants

As the Advisory Committee's restylization effort approaches Rule 41, I wanted to gain your insight and that of your magistrate judge colleagues on whether Rule 41 should be amended to better accommodate warrants for tracking devices.

As you know, the courts have held that there are many occasions when a warrant is needed to install or monitor such devices (though there are other occasions when it is not). For example, a warrant would be needed to install the device if an entry onto the defendant's property were necessary to place it, and to monitor the device if it revealed information unobtainable through lawful visual surveillance. See, e.g., United States v. Karo, 468 U.S. 705 (1984). The problem with Rule 41 is that it does not contemplate searches in which property is not taken, and thus does not address the issue of when the person aggrieved must be notified of such a search.

The same problem arises with respect to so-called "sneak and peek" searches in which the sole object is surreptitious observation of premises in aid of an investigation. The Department has concluded that Rule 41 should be amended to address these kinds of searches, which have been upheld by the only two courts of appeals that have considered them, and will (when the Committee focuses on Rule 41, presumably after October) be proposing a specific amendment to Rule 41(d), calling for delayed notice to the person aggrieved in these searches, consistent with the holdings in the court of appeals cases previously mentioned.

Recently, an AUSA remarked to me that a similar amendment might be appropriate to deal with warrants for tracking devices, since, as with warrants authorizing entry on premises for visual

observation, it would obviously defeat the purpose of the search if notice had to be given simultaneously to the aggrieved person that a particular object was being electronically monitored through a tracking device. Yet, the AUSA noted, because Rule 41 failed to address the question, some magistrate judges in his experience were uncertain as to the kind of warrant to issue and the terms thereof, especially as regards giving notice of the search. (The only black letter law addressing tracking device searches is 18 U.S.C. 3117, which merely provides that a court has power to authorize the use of such a device outside its jurisdiction if the device is installed within its jurisdiction.)

I wonder if you and your colleagues share the view that it would be helpful to amend Rule 41 to treat these kinds of tracking device warrants more specifically so as to give greater guidance to judges and prosecutors. Since as previously noted we plan to ask the Committee to focus on a similar issue involving "sneak and peek" searches, it would be convenient to put the question of tracking device warrants before the Committee at the same time, assuming you and your colleagues believe it would be useful to do so.

I look forward to your response and to seeing you again at the October meeting.

News

Electronic Surveillance

DOJ Floats Proposal for Covert Entries To Facilitate Decryption of Computer Data

The U.S. Department of Justice is proposing legislation that would authorize the issuance of warrants allowing law enforcement to make covert entries for the purpose of searching for information that is necessary to decode encrypted computer data or installing "recovery devices" designed to defeat encryption technologies. The proposed legislation, the Cyberspace Electronic Security Act, would also establish rules on disclosure and use of "decryption keys" stored with third-party "key recovery agents." The DOJ has long pushed for legislation requiring access to such information.

The proposal, which surfaced Aug. 20 on the Center for Democracy & Technology's World Wide Web site (http://www.cdt.org) Aug. 20, is still "a work in progress" that is not ready to present to Congress, according to Assistant Attorney General James Robinson, head of the Justice Department's Criminal Division. Robinson spoke at a press conference at the Justice Department Aug. 20. While confirming the effort, Robinson declined to address specific proposals in the draft bill.

The draft bill begins with proposed congressional findings that, among other things, recognize both the importance of encryption as a tool for protecting legitimate privacy interests and the capability of encryption as a means of hiding unlawful activities. The findings also assert that the means of evidence collection provided by existing law "are rendered wholly insufficient when encryption is utilized to scramble the information in such a manner that law enforcement, acting pursuant to lawful authority, cannot decipher the evidence."

Under the covert entry provision, which would be encoded as 18 USC 2713, a federal governmental entity could seek a warrant "to search for and obtain recovery information or other information necessary to obtain access to the plaintext of data or communications, or to install and use a recovery device . . . ." The proposed law's definitional section explains that "recovery information" is information that can be used to decrypt data or communications; a "recovery device" is "any enabling or modification of any part of a computer or other system . . . that allows plaintext to be obtained even if attempts are made to protect it though encryption or other security techniques or devices."

Upon a showing of good cause, federal agents could forgo the usual requirement of leaving notice when executing a warrant. Section 2713 would also require phone companies, landlords, and others to assist the agents in executing the warrant if so ordered by the issuing magistrate. The warrant would be issued under seal, and anyone compelled to assist in its execution would be forbidden to disclose anything about the agents' actions absent court order.

Under a provision analogous to the minimization provision of the electronic surveillance and wiretap law, 18 USC 2518(5), agents would be required to minimize the obtaining of information other than what the warrant authorized them to seek. They would also have to work in such a way as to minimize the possibility that others might get access to recovery information or the plaintext of encrypted data.

Access to Stored Recovery Information. The bill also sets out the conditions under which "recovery agents"—third parties who provide recovery information storage services under confidentiality agreements—could either disclose such information or use it to decode encrypted data. It also addresses the requirements for government access to, use of, and disclosure of stored recovery information.

Under a new Section 2712, the government could obtain such information pursuant to a search warrant, an order issued under the wiretap statute, a court order pursuant to a provision (Section 2712(b) that would be added by the new bill, or a specially designated law enforcement officer's conclusion that an emergency exists. The Justice Department's section-by-section analysis of the bill notes that a grand jury subpoena could be used to obtain stored recovery information only in the unusual case in which the person or entity that stored the recovery information consents to its disclosure but the holder of the encryption key balks.

To issue an order under Section 2712(b), a court would have to find that use of stored recovery information is reasonably necessary to allow access to the plaintext of data or communications, that such access is "otherwise lawful," that the entity requesting access will seek it within a reasonable time, and either that there is no constitutionally protected expectation of privacy in the plaintext or that that interest has been overcome. The person or entity that stored the recovery information would have to be notified within 90 days unless a court postponed notice on a showing of good cause.

To invoke the provision for obtaining stored recovery information without a court order, an officer would have to be specially designated by a high-ranking prosecutorial official. The officer would have to find the existence of an emergency requiring that recovery information be obtained or used before a court order could be obtained. The emergency would have to involve either an immediate danger of death or serious physical injury to a person, or conspiratorial activities that either threaten national security or are "characteristic of organized crime or terrorism . . . ." The officer would also have to determine that grounds for obtaining an order exist, and such an order would have to be obtained within 48 hours.

Use of Information. A warrant, order, or executive determination granting the authority to search for recovery information or to obtain it from a recovery agent would have to specify the data and communications that could be decrypted; further uses would require another court order. Similarly, absent a court order, the information obtained could be disclosed only in connection with the matter for which it was obtained, and only if the disclosure is appropriate to the proper performance of the disclosing entity's official functions. The bill would provide for the eventual destruction of the recovery information.

Work in Progress. Robinson said that DOJ has been working on the draft legislation for more than a year and that the White House "is very much engaged in the process." He declined to say if a target date has been set for the proposal's completion.

Robinson said law enforcement authorities are concerned about the increasing ability of criminals to electronically store data that they are unable to read. The bill drafting effort is an attempt to address this inequity, he said.

However, Robinson added that it is "critically important" to for the drafters to figure out how to strike a balance between privacy interests and law enforcement needs before such a draft would be ready to present to Congress.

When asked how he expected such a DOJ proposal to be received on Capitol Hill, Robinson said he was "sure that thoughtful members of Congress" would want to reach that balance as well.

But the DOJ draft bill has already drawn fire from at least one member of the House. Rep. Bob Goodlatte (R-Va.), chief sponsor of legislation that, among other things, would restrict law enforcement's ability to access certain types of computer information, is criticizing the draft's key goal. An aide to Goodlatte called the bill "unprecedented and uneeded."

"They are trying to get around the balance in current law," the aide told BNA Aug. 20. "The current subpoena process works. This proposal goes over the top."

Prisons and Jails

BOP Doesn't Do Enough to Curb Inmates' Criminal Use of Phones, DOJ Report Says

A significant number of federal prisoners are abusing their telephone privileges to engage in criminal activity, and the countermeasures currently being taken by the Bureau of Prisons are insufficient, according to a report issued Aug. 12 by the Justice Department's Office of Inspector General. The OIJ report made several recommendations for addressing the problem, including increased monitoring of prisoners' phone calls and a step-up in discipline of offenders.

The information sources on which OIJ based its report included questionnaires asking all U.S. Attorney's Offices to identify prosecutions involving crimes committed by prisoners using phones in BOP facilities, examinations of several such prosecutions, questionnaires addressed to the BOP institutions that have telephone equipment capable of collecting and analyzing data on inmate phone calls, and interviews with staff.

The report concluded that "inmate abuse of prison telephones appears to be widespread." Prosecutors reported 117 cases involving inmate' use of prison phones to commit crimes. The crime included murders or attempted murders, threats against witnesses, and fraud schemes.

Inadequate Efforts. The prisons bureau does not do nearly enough monitoring of inmates' calls, the report said. Furthermore, the employees who perform monitoring are not adequately trained in matters such as recognizing suspicious activities or coded language, deciding which inmates to monitor, and detecting forbidden three-way calls. It also appears from the report that the BOP lacks monitors capable of understanding some of the foreign languages used by some inmates, and that insufficient attention is paid to scrutinizing the individual lists of persons to whom prisoners are allowed to place calls.

The report was critical of the BOP's philosophy regarding inmate phone use. The agency "believes that telephone contact with family and friends plays an important part in an inmate's rehabilitation and leads to less recidivism and better behavior in prison," the report stated. However, the agency has never studied the value of telephone privileges, the report said; furthermore, the OIG found evidence that casts doubt on what it called the BOP's "apparent belief that inmates primarily use the telephone to maintain family relationships and ties to the community."

Besides the BOP's benign view of inmate phone use, another reason for its current failure to take steps against abuse is the belief of some officials that the problem will be substantially reduced during the next two years by the installation of a new telephone system. The reported asserted, however, that "[n]o new technology on the horizon—including the BOP's new inmate telephone system—will solve the problem of inmate telephone abuse without aggressive intervention by BOP officials."

Recommendations. The report recommended that the BOP take the following four steps: increase the percentage of calls it monitors, increase its discipline of telephone abusers and make that discipline more consistent, restrict telephone privileges proactively for inmate who already have a history or likelihood of engaging in telephone abuse, and emphasize to employees their responsibility to detect and deter crimes committed by inmates via phone.

News in Brief

Drugs

A decline in illicit drug use among youths age 12–17 was among the highlights of the National Household Survey on Drug Abuse released Aug. 17 by the Department of Health and Human Services. The figure dropped from 11.4 percent of that age group in 1997 to 9.9 percent in 1998. For the overall population, the rate of illicit drug use remained the same.

CRL ISSN 0011-1341

II-D

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Restyling Project — Schedule

DATE: September 9, 1999

Attached are two memos addressing the issue of the schedule for the restyling project. The first is from John Rabiej to Judge Davis raising the issue of scheduling and the second, is Judge Davis' response.

Judge Davis has indicated that the question of the proposed schedule should be on the agenda for discussion at the October meeting.

At this point, the project appears to be on schedule. As noted in the original memo on the subject in October 1998, the proposed schedule was to have all of the rules restyled in time to present them to the Standing Committee in June 2000, with publication to follow in August or September 2000. Under that schedule (assuming a 6-month comment period) the rules would come back to the Advisory Committee in Spring 2001 for review and take effect on December 1, 2002.

Judge Scirica has asked that if possible, the restyled rules be submitted in parts to the Standing Committee. If the current schedule holds, we can submit Rules 1-31 to the Standing Committee for its January 2000 meeting, and the remainder at the June 2000 meeting. If the Committee decides not to maintain that schedule then the effective date would not be until 2003.

In deciding whether to maintain the current schedule it might be helpful to consider the following:

- This October, the Committee is losing two members who have worked on the project for the last year. Additional members are due to rotate off the Committee in 2000, including the Chair. It is difficult for new members to assume immediately the same momentum and expertise of the departing members.

- The Standing Committee's Style Subcommittee is losing several members and Bryan Garner will no longer be working with that Subcommittee.

- The current schedule would require at least one special Committee meeting in January 2000 and several additional Subcommittee meetings in Nov-December 1999 and possibly in the Spring 2000.

- The project is placing a heavy burden on the Reporter and the Rules Committee Support Office to coordinate the meetings, distribute materials, and update drafts of the rules and notes.

- The Committee and Subcommittees have developed some momentum on the project; each set of rules seems to go more smoothly than the last.

- At the end of the October meeting, the Committee will have reviewed at least half of the rules.

One final thought. If the Committee is inclined to maintain the current schedule, the amount of time spent in the restyling project can be adjusted to recognize a "minimalist approach" to substantive changes. In the normal course of Committee work, the Committee usually considers a written proposal from a source outside the Committee or from an individual member, who has given some thought and research to the proposal and has perhaps even drafted some suggested language. In the restyling effort, however, a number of substantive changes have been raised for the first time at either a subcommittee meeting or full committee meeting, and the research follows. The whole process might go more quickly if it is assumed that the current substantive language is still viable and focus primarily on whether the restyled language makes any unintended substantive changes.

I have also attached a proposed time frame, which is a modified version of John Rabiej's proposal.

Proposed Schedule for Restyling Project

Oct. 99	Nov. 99	Dec. 99	Jan. 00	Feb. 00	Mar. 00	Apr. 00	May 00	Jun. 00
AC reviews Rules 1-9 (final); 10-22 (2d draft) 23-31 (1st draft)	Subcommittee B—reviews Rules 32-50 (Meeting) Subcommittee A—reviews Rules 51-60 (Meeting)	AC reviews final drafts of Rules 1-31 & Notes for transmission to Standing Committee (no meeting required)	SC reviews Rules 1-31and Notes (Jan 6-7) AC at special meeting (Jan. 10-11) reviews Rules 32-60 (and Notes?)	Subcommittee B reviews revised Rules 32-50 and Notes (no meeting proposed) Subcommittee A reviews revised Rules 51-60 and Notes (no meeting proposed)		AC at regular meeting reviews Rules 32-60 and any SC suggested changes to Rules 1-31	AC reviews any changes to Rules 1-60 (no meeting proposed)	AC presents Rules 31-60 to SC with view toward publishing Rules 1-60 for comment

Notes

1. Under this proposal, Subcommittee A would be responsible for a total of 33 Rules (three subcommittee meetings) and Subcommittee B would be responsible for 37 rules (two subcommittee meetings)

2. The proposed schedule envisions more work earlier, rather than later by proposing that the first draft of Rules 32-60 be considered at the January 2000 meeting, and leaving the April 2000 meeting as a safety net and to wrap up any unresolved issues not addressed at January meeting.

3. It is assumed that the Subcommittees could review Rules and Notes via conference calls.

4. The schedule calls for publication of all rules at one time—August or September 2000.

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

August 13, 1999
Via Fax

MEMORANDUM TO JUDGE W. EUGENE DAVIS

SUBJECT: *Planning for Upcoming Style Meetings*

For your information, I have attached two time charts that represent possible scheduling of future committee and subcommittee stylization meetings. The breakdown of rules assigned to the subcommittees is rough and can be easily modified.

The first chart shows that if we continue on our present course, the stylized rules-package would take effect in 2003. The second chart shows one way we could accelerate the process, so that the rules would take effect in 2002. But the added burden imposed on the committee members would be significant. Under the accelerated process, the members would meet five times from October 1999 to April 2000 in subcommittee or committee meetings. Moreover, the public comment would be shortened to six months, instead of the 9-12 months which would be available under the present course of action. Finally, the Standing Committee would be burdened with reviewing Rules 10-60 at the June 2000 meeting.

It would be helpful to the subcommittee chairs to know which course we plan to take. Maybe this is an issue better discussed by the full committee at the October meeting.

John K. Rabiej

Attachment

cc: Honorable Anthony J. Scirica
Professor David A. Schlueter

YEAR	MONTH	FULL COMMITTEE		SUBCOMMITTEE	
		Final Action	Review	Final Action	Review
1999	Sept			Sub "A" 1-9 Notes	23-31 Rules
	Oct	1-9 Notes	10-23 Notes 23-31 Rules		
	Nov-Dec			Sub "B" 10-23 Notes Sub "A" 23-31 Notes	Sub "B" 32-42 Rules Sub "A" 43-60 Rules
2000	Jan	10-23 Notes 23-31 Notes	32-42 Rules 43-60 Rules		
	Feb			Sub "B" 32-42 Notes Sub "A" 43-60 Notes	
	April	32-42 Notes 43-60 Notes			
	May				
	June	Standing Comte			
	August	Publish			
2001	April	Review Comments			
	June	Standing Comt approves			
2002	May	Supreme Court approves			
	December	Effective			

YEAR	MONTH	FULL COMMITTEE		SUBCOMMITTEE	
		Final Action	Review	Final Action	Review
1999	Sept			Sub "A" 1-9 Notes	23-31 Rules
	Oct	1-9 Notes	10-23 Notes 23-31 Rules		
	Nov			Sub "B" 10-23 Notes	32-42 Rules
2000	Jan	10-23 Notes	32-42 Rules		
	Feb			Sub "A" 23-31 Notes	43-60 Rules
	April	23-31 Notes	43-60 Rules		
	May			Sub "B" 32-42 Notes	
	June	32-42 Notes			
	Sept			Sub "A" 43-60 Notes	
	Oct	43-60 Notes			
2001	Jan	Standing Comte			
	Feb	Publish			
2002	April	Review Comments			
	June	Standing Comt approves			
2003	May	Supreme Court approves			
	December	Effective			

II-E

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Restyling Project — Rules 1-9**

DATE: **September 9, 1999**

Rules 1-9 and Committee Notes, as revised at the June 1999 meeting in Portland, have been reviewed by Subcommittee A and the Standing Committee's Subcommittee on Style. Those updated materials follow this memo.

The boldfaced text indicates matters that may require further Committee attention.

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

September 7, 1999
Via Federal Express Mail

MEMORANDUM TO PROFESSOR DAVID A. SCHLUETER

SUBJECT: *Stylized Rules 1 through 31*

I have attached the most recent compilation of stylized Rules 1 through 31. They include notes for the first 22 rules.

The left-hand columns have been corrected to reflect all recent amendments to the existing rules. The review revealed several omissions that were not considered when the right-hand column material was being discussed. In most cases, the omissions are minor and would not alter the restyled rules contained in the right-hand columns. (A complete listing is attached.) But there are two omissions that need to be accounted for and are listed below:

1. Rule 5(a) omitted recent amendment governing fugitive flight offenses.

2. Rule 16(a)(1)(E), (a)(2), and (b)(1)(C) omitted 1997 amendments.

The Standing Style Subcommittee needs to look at these omissions as well. Please also note that Rule 12.2 (b) and (c) in the right-hand column reflects the Standing Style's Subcommittee revision of the proposed amendments.

The Standing Style Subcommittee's comments on the full committee's revisions to Rules 10 through 22 are attached. Judge Dowd's subcommittee needs to look at these suggestions. (The Standing Style Subcommittee's suggested edits to Rules 1 through 9 were considered and acted on at Subcommittee "A's" September 1 meeting.) We will include Notes to Rules 23 through 31 as soon as you complete them. Hopefully all this material will be completed in time to place in the agenda books for the October 7-8 committee meeting.

John K. Rabiej

Attachments

cc: Honorable W. Eugene Davis (without attach.)
Honorable David D. Dowd (with attach.)
Standing Style Subcommittee (with attach.)
Professor Stephen A. Saltzburg (with attach.)

I. SCOPE, PURPOSE, AND CONSTRUCTION	**Title I. Applicability of Rules**
	Rule 1. Scope; Definitions
Rule 1. Scope These rules govern the procedure in all criminal proceedings in the courts of the United States, as provided in Rule 54(a); and, whenever specifically provided in one of the rules, to preliminary, supplementary, and special proceedings before United States magistrate judges and at proceedings before state and local judicial officers. **Rule 54. Application and Exception** (a) **Courts**. These rules apply to all criminal proceedings in the United States District Courts; in the District of Guam; in the District Court for the Northern Mariana Islands, except as otherwise provided in articles IV and V of the covenant provided by the Act of March 24, 1976 (90 Stat. 263); in the District Court of the Virgin Islands; and (except as otherwise provided in the Canal Zone) in the United States District Court for the District of the Canal Zone; in the United States Courts of Appeals; and in the Supreme Court of the United States; except that the prosecution of offenses in the District Court of the Virgin Islands shall be by indictment or information as otherwise provided by law.	**(a) Scope.** **(1)** ***In General.*** These rules govern the procedure in all criminal proceedings in the United States District Courts, United States Courts of Appeals, and the Supreme Court of the United States. **(2)** ***State or Local Officer.*** When a rule so states, it applies to a proceeding before a state or local officer. **(3)** ***Territorial Courts.*** These rules also govern the procedure in criminal proceedings in the following courts: (A) the district court of Guam; (B) the district court for the Northern Mariana Islands, except as otherwise provided by law; and (C) the district court of the Virgin Islands, except that the prosecution of offenses in that court must be by indictment or information as otherwise provided by law.

(b) PROCEEDINGS (Rule 54 continued) **(1) Removed Proceedings.** These rules apply to criminal prosecutions removed to the United States district courts from state courts and govern all procedure after removal, except that dismissal by the attorney for the prosecution shall be governed by state law. **(2) Offenses Outside a District or State.** These rules apply to proceedings for offenses committed upon the high seas or elsewhere out of the jurisdiction of any particular state or district, except that such proceedings may be had in any district authorized by 18 U.S.C. § 3238. **(3) Peace Bonds.** These rules do not alter the power of judges of the United States or of United States magistrate judges to hold security of the peace and for good behavior under Revised Statutes, § 4069, 50 U.S.C. § 23, but in such cases the procedure shall conform to these rules so far as they are applicable. **(4) Proceedings Before United States Magistrate Judges.** Proceedings involving misdemeanors and other petty offenses are governed by Rule 58.	**(4)** ***Removed Proceedings.*** Although these rules govern all proceedings after removal from a state court, state law governs a dismissal by the prosecution.
(5) Other Proceedings. These rules are not applicable to extradition and rendition of fugitives; civil forfeiture of property for violation of a statute of the United States; or the collection of fines and penalties. Except as provided in Rule 20(d) they do not apply to proceedings under 18 U.S.C. Chapter 403 — Juvenile Delinquency — so far as they are inconsistent with that chapter. They do not apply to summary trials for offenses against the navigation laws under Revised Statutes §§ 4300-4305, 33 U.S.C. §§ 391-396, or to proceedings involving disputes between seamen under Revised Statutes §§ 4079-4081, as amended, 22 U.S.C. §§ 256-258, or to proceedings for fishery offenses under the Act of June 28, 1937, c. 392, 50 Stat. 325-327, 16 U.S.C. §§ 772-772i, or to proceedings against a witness in a foreign country under 28 U.S.C. § 1784.	**(5)** ***Excluded Proceedings.*** Proceedings not governed by these rules include: (A) the extradition and rendition of a fugitive; (B) a civil property forfeiture for the violation of a federal statute; (C) the collection of a fine or penalty; (D) a proceeding under a statute governing juvenile delinquency to the extent the procedure is inconsistent with the statute, unless Rule 20(d) provides otherwise; and (E) a dispute between seamen under 22 U.S.C. §§ 256–58.

(c) Application of Terms. (Rule 54 continued) As used in these rules the following terms have the designated meanings. "Act of Congress" includes any act of Congress locally applicable to and in force in the District of Columbia, in Puerto Rico, in Puerto Rico, in a territory or in any insular possession. "Attorney for the government" means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney, when applicable to cases arising under the laws of Guam the Attorney General of Guam or such other person or persons as may be authorized by the laws of Guam to act therein, and when applicable to cases arising under the laws of the Northern Mariana Islands the Attorney General of the Northern Mariana Islands or any other person or persons as may be authorized by the laws of the Northern Marianas to act therein. "Civil action" refers to a civil action in a district court. The words "demurrer," "motion to quash," "plea in abatement," "plea in bar" and "special plea in bar," or words to the same effect, in any act of Congress shall be construed to mean the motion raising a defense or objection provided in Rule 12. "District court" includes all district courts named in subdivision (a) of this rule.	**(b) Definitions.** The following definitions apply to these rules: (1) ["Court" includes a district judge when a criminal proceeding is in a United States court or in a Rule 1(a)(3) territorial court and also includes a magistrate judge when performing functions authorized by law.] (2) ["Federal judge" means: (A) a justice of the Supreme Court of the United States; (B) a judge of the United States as defined in 28 U.S.C. § 451; or (C) a United States magistrate judge.] — may be unnecessary after further review
"Federal magistrate judge" means a United States magistrate judge as defined in 28 U.S.C. §§ 631-639, a judge of the United States or another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates. "Judge of the United States" includes a judge of the district court, court of appeals, or the Supreme Court. "Law" includes statutes and judicial decisions. "Magistrate judge" includes a United States magistrate judge as defined in 28 U.S.C. §§ 631-639, a judge of the United States, another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates, and a state or local judicial officer, authorized by 18 U.S.C. § 3041 to perform the functions prescribed in Rules 3, 4, and 5.	(3) "Government attorney" means: (A) the Attorney General, or an authorized assistant; (B) a United States attorney, or an authorized assistant; (C) when applicable to cases arising under Guam law, the Guam Attorney General or other person whom Guam law authorizes to act in the matter; and (D) any other attorney authorized by law to conduct proceedings under these rules as a prosecutor. (4) "Judge" means a federal judge or a state or local officer. (5) "Magistrate Judge" means a United States magistrate judge.

"Oath" includes affirmations. "Petty offense" is defined in 18 U.S.C. § 19. "State" includes District of Columbia, Puerto Rico, territory and insular possession. "United States magistrate judge" means the officer authorized by 28 U.S.C. §§ 631-639.	(6) "Oath" includes an affirmation. (7) "Organization" is defined in 18 U.S.C. § 18. (8) "Petty offense" is defined in 18 U.S.C. § 19. (9) "State" includes the District of Columbia, and any commonwealth, territory, or possession of the United States. (10) "State or local officer" includes: (A) a state or local officer authorized to act under 18 U.S.C. § 3041; and (B) a judicial officer specifically empowered by statute in force in the District of Columbia or in any commonwealth, territory, or possession, to perform a function to which a particular rule relates. **(c) Authority of Justices and Judges of the United States.** When these rules authorize a magistrate judge to act, a justice or a judge of the United States as defined in 28 U.S.C. § 451 may act.

Committee Notes
Rule 1
September 8, 1999

COMMITTEE NOTE

Rule 1 has been entirely revised. The rule has been expanded by incorporating Rule 54 because that rule deals with the application of the rules— even though existing Rule 1 purports to cover "Scope." First, the Committee believed that a statement of the scope of the rules should be at the beginning to show readers which proceedings are governed by these rules. Second, the revised Rule also contains Rule 54(c) — "Application of Terms" — as a new Rule 1(b), now entitled "Definitions." The Committee believed that it would be helpful to include at the beginning the definitions that apply generally to all the rules.

Rule 1(a) now contains language from Rule 54(b)(1). Language in current Rule 54(b)(2)-(4) has been deleted for several reasons: First, Rule 54(b)(2) refers to a venue statute that indicates where an offense committed on the high seas or somewhere outside the jurisdiction of a particular district is to be tried; once venue has been established, then the Rules of Criminal Procedure automatically apply. Second, Rule 54(b)(3) currently deals with Peace Bonds; that provision is inconsistent with the governing statute and is therefore deleted. Finally, Rule 54(b)(4) addresses proceedings conducted before United States Magistrate Judges, a topic now covered in Rule 58. Thus, it too was considered redundant and has been deleted.

Rule 1(a)(5) consists of material currently located in Rule 54(b)(5), with the exception of the references to fishery offenses and to proceedings against a witness in a foreign country. Those provisions were considered obsolete; those proceedings, if they were to arise, would be governed by the Rules of Criminal Procedure.

Rule 1(b) is composed of material currently located in Rule 54(c), with several exceptions. First, "Act of Congress" has been deleted from the restyled rules; instead the rules use the term "federal statute." Second, the language concerning demurrers, pleas in abatement, etc. has been deleted as being anachronistic. Third, the definitions of "civil action" and "district court" have been deleted as being unnecessary. Fourth, the term used currently, "attorney for the government," has been changed to "government attorney" and has been expanded to include reference to those attorneys who may serve as special or independent counsel under applicable federal statutes.

Fifth, the Committee has added a definition for the term "court" at Rule 1(b)(1). Although that term originally was almost always synonymous with the term

"district judge," the term might be misleading or unduly narrow to the extent that magistrate judges now, at least in some districts, perform many of the functions originally limited to district judges. *See generally* 28 U.S.C. §§ 132, 636. Additionally, Circuit judges may be authorized to hold a district court. *See* 28 U.S.C. § 291. The proposed definition continues the traditional interpretation that "court" means district judge, but also reflects the current understanding that law may permit magistrate judges to act as the "court."

Sixth, the term "Judge of the United States"` has been replaced with the term "Federal Judge." Seventh, the definition of "Law" has been deleted as being superfluous and possibly misleading in the sense that it suggests that administrative regulations are excluded.

Eighth, the current rules include three definitions for "magistrate judge." The term used in amended Rule 1(b)(4) is limited to United States Magistrate Judges. In the current rules the term magistrate judge reads broadly: it includes not only United States Magistrate Judges, but also district court judges, court of appeals judges, Supreme Court Justices, and where authorized, state and local officers. The Committee believed that the rules should reflect current practice, i.e. the wider and almost exclusive use of United States Magistrate Judges, especially in preliminary matters. The definition, however, is not intended to restrict the use of other federal judicial officers to perform those functions. Thus, Rule 1(c) has been added to make clear that where the rules authorize a magistrate judge to act, any other federal judge or justice may act.

Finally, the term "organization" has been added to the list of definitions.

The remainder of the rule has been amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Committee has changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only.

Rule 2. Purpose and Construction	Rule 2. Interpretation
These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.	These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.

Committee Notes
Rule 2
September 8, 1999

COMMITTEE NOTE

The language of Rule 2 has been amended to make the rule more easily understood. The Committee has changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic. No substantive change is intended.

In particular, Rule 2 has been amended to clarify the effect of the Rules of Criminal Procedure. The words "are intended" have been changed to read "are to be interpreted." The Committee believed that that was the original intent of the drafters and more accurately reflects the purpose of the rules.

II. PRELIMINARY PROCEEDINGS	**Title II. Preliminary Proceedings**
Rule 3. The Complaint	**Rule 3. The Complaint**
The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a magistrate judge.	The complaint is a written statement of the essential facts constituting the offense charged. It must be made under oath before a magistrate judge, or, if none is reasonably available, before a state or local officer.

Committee Notes
Rule 3
September 8, 1999

COMMITTEE NOTE

Rule 3 has been amended to make the rule more easily understood. The Committee has also changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only. No substantive change is intended.

Current Rule 3 requires the complaint to be sworn before a "magistrate judge," which under current Rule 54 could include a state or local judicial officer. As that term is now defined in Rule 1, state and local officers are no longer included in the definition of magistrate judges for the purposes of these rules. Instead, the definition refers only to United States Magistrate Judges.

Read together, Rule 3 requires that the complaint be made before a United States Magistrate Judge or before a state or local officer. The revised rule does, however, make a change to reflect prevailing practice, and the outcome desired by the Committee, that the procedure take place before a *federal* judicial officer if one is reasonably available. As noted in Rule 1(c), where the rules, such as Rule 3, authorize a magistrate judge to act, any other United States judge or justice may act.

Rule 4. Arrest Warrant or Summons Upon Complaint	Rule 4. Arrest Warrant or a Summons on a Complaint
(a) Issuance. If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.	**(a) Issuance.** If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant to an officer authorized to execute it. At the request of the government attorney, the judge must issue a summons, instead of a warrant, to a person authorized to serve it. A judge may issue more than one warrant or summons on the same complaint. If a defendant fails to appear in response to a summons, a judge may, and upon request of the government attorney must, issue a warrant.
(b) Probable Cause. The finding of probable cause may be based upon hearsay evidence in whole or in part.	
(c) Form. **(1) Warrant.** The warrant shall be signed by the magistrate judge and shall contain the name of the defendant or, if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available magistrate judge. **(2) Summons.** The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate at a stated time and place.	**(b) Form.** **(1)** ***Warrant.*** A warrant must: (A) contain the defendant's name or, if it is unknown, a name or description by which the defendant can be identified with reasonable certainty; (B) describe the offense charged in the complaint; (C) command that the defendant be arrested and promptly brought before a magistrate judge or, if none is reasonably available, before a state or local officer; and (D) be signed by a judge. **(2)** ***Summons.*** A summons is to be in the same form as a warrant except that it must require the defendant to appear before a magistrate judge at a stated time and place.

(d) Execution or Service; and Return. **(1) By Whom.** The warrant shall be executed by a marshal or by some other officer authorized by law. The summons may be served by any person authorized to serve a summons in a civil action. **(2) Territorial Limits.** The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States.	**(c) Execution or Service, and Return.** **(1)** ***By Whom.*** Only a marshal or other authorized officer may execute a warrant. Any person authorized to serve a summons in a federal civil action may serve the summons. **(2)** ***Territorial Limits.*** A warrant may be executed, or a summons served, only within the jurisdiction of the United States.
(3) Manner. The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant at the time of the arrest but upon request shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant at the time of the arrest, the officer shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The summons shall be served upon a defendant by delivering a copy to the defendant personally, or by leaving it at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein and by mailing a copy of the summons to the defendant's last known address.	**(3)** ***Manner.*** (A) A warrant is executed by arresting the defendant. Upon arrest, the officer must inform the defendant of the warrant's existence and of the offense charged. At the defendant's request, the officer must show the warrant to the defendant as soon as possible. (B) A summons is served on a defendant: (i) by personal delivery; or (ii) by leaving it at the defendant's residence or usual place of abode with a person of suitable age and discretion residing at that location and by mailing a copy to the defendant's last known address. (C) A summons to an organization is served by delivering a copy to an officer or to a managing or general agent or to another agent appointed or legally authorized to receive service of process. If the agent is one statutorily authorized to receive service and if the statute so requires, a copy must also be mailed to the organization's last known address within the district or to its principal place of business elsewhere in the United States.

(4) Return. The officer executing a warrant shall make return thereof to the magistrate judge or other officer before whom the defendant is brought pursuant to Rule 5. At the request of the attorney for the government any unexecuted warrant shall be returned to and canceled by the magistrate judge by whom it was issued. On or before the return day the person to whom a summons was delivered for service shall make return thereof to the magistrate judge before whom the summons is returnable. At the request of the attorney for the government made at any time while the complaint is pending, a warrant returned unexecuted and not canceled or summons returned unserved or a duplicate thereof may be delivered by the magistrate judge to the marshal or other authorized person for execution or service.	**(4)** ***Return.*** (A) After executing a warrant, the officer must return it to the judge before whom the defendant is brought in accordance with Rule 5. At the government attorney's request, an unexecuted warrant must be brought back to and canceled by a magistrate judge or, if none is reasonably available, by a state or local officer. (B) The person to whom a summons was delivered for service must return it on or before the return day. (C) At the request of the government attorney, a judge may deliver an unexecuted warrant or an unserved summons or a copy of the warrant or summons to the marshal or other authorized person for execution or service.

Committee Notes
Rule 4
September 8, 1999

COMMITTEE NOTE

Rule 4 has been amended to make the rule more easily understood. The Committee has also changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only. Several substantive changes have been made, however.

Rule 4(a) has been amended to provide an element of discretion in those situations where the defendant fails to respond to a summons. Under the current rule, the judge must in all cases issue an arrest warrant. The rule now provides that if the government attorney does not request that an arrest warrant be issued on a failure to appear, the judge may decide whether to issue one or not.

Current Rule 4(b), which refers to the fact that hearsay evidence may be used to support probable cause, has been deleted. That language was added to the Rule in 1974, apparently to reflect emerging federal case law. *See* Advisory Committee Note to 1974 Amendments to Rule 4 (citing cases). In the intervening years, the case law has become perfectly clear on that proposition; what was once questionable is now axiomatic. Thus, the Committee believed that the reference to hearsay was no longer necessary. Arguably, the limited reference to hearsay evidence was misleading to the extent that it might have suggested that other forms of inadmissible evidence could not be considered. For example, the rule made no reference to considering a defendant's prior criminal record, which clearly may be considered in deciding whether probable cause exists. *See, e.g.,* Brinegar v. United States, 338 U.S. 160 (1949) (officer's knowledge of defendant's prior criminal activity). Rather than address that issue, or any other similar issues, the Committee believed that the matter was best addressed in Rule 1101(d)(3), Federal Rules of Evidence. That rule explicitly indicates that the Federal Rules of Evidence do not apply to "preliminary examinations in criminal cases,...issuance of warrants for arrest, criminal summonses, and search warrants." The Advisory Committee Note accompanying that rule recognizes that: "The nature of the proceedings makes application of the formal rules of evidence inappropriate and impracticable. The Committee did not intend to make any substantive changes in practice by deleting the reference to hearsay evidence.

New Rule 4(b), which is currently Rule 4(c), addresses the form of an arrest warrant and a summons and includes two changes. First, Rule 4(b)(1)(C) now requires that the warrant require that the defendant be brought "promptly" before a judge. The Committee believed that this was a more appropriate standard than the current requirement that the defendant be brought before the nearest available

magistrate judge. Under Rule 1(b)(4), a magistrate judge is a United States Magistrate Judge. This language accurately reflects the thrust of the original rule, that time is of the essence and the necessity of bringing a defendant before a judicial officer with some dispatch, regardless of the location of that officer. Second, the revised rule states a preference that the defendant be brought before a federal judicial officer.

Rule 4(b)(2) has been amended to require that if a summons is issued, the defendant must appear before a magistrate judge. The current rule requires the appearance before a "magistrate," which could include a state or local judicial officer. This is consistent with the preference for requiring defendants to appear before federal judicial officers stated in revised Rule 4(b)(1).

Rule 4(c) (currently Rule 4(d)) includes three substantive changes. First, current Rule 4(d)(3) provides that the arresting officer is only required to inform the defendant of the offense charged, and that a warrant exists, if the officer does not have a copy of the warrant. As revised, Rule 4(c)(3)(A) requires the arresting officer in all instances to inform the defendant of the offense charged and of the fact that a warrant exists for his or her arrest. The new rule continues the current provision that the arresting officer need not have a copy of the warrant but if the defendant requests to see it, the officer must show the warrant to the defendant as soon as possible. The rule does not attempt to define any particular time limits for showing the warrant to the defendant.

Second, Rule 4(c)(3)(C) is taken from former Rule 9(c)(1). That provision specifies the manner of serving a summons on an organization. The Committee believed that Rule 4 was the more appropriate place to locate the general provisions for addressing the mechanics of arrest warrants and summons. As noted at Rule 9, that rule now liberally cross-references the basic provisions appearing in Rule 4.

Third, a change has been made in Rule 4(c)(4). Currently, Rule 4(d)(4) requires that an unexecuted warrant must be returned to the magistrate judge who issued it. As amended, Rule 4(c)(4)(A) indicates that after a warrant is executed, the officer must return it to the judge before whom the defendant will appear under Rule 5. At the government's request, however, an unexecuted warrant may be returned and canceled by any magistrate judge. The change recognizes the possibility that at the time the warrant is returned, the issuing magistrate judge may not be available.

Rule 5. Initial Appearance Before the Magistrate Judge	Rule 5. Initial Appearance
(a) In General. Except as otherwise provided in this rule, an officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate judge or, in the event that a federal magistrate judge is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. If a person arrested without a warrant is brought before a magistrate judge, a complaint, satisfying the probable cause requirements of Rule 4(a), shall be promptly filed. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate judge, the magistrate judge shall proceed in accordance with the applicable subdivisions of this rule. An officer making an arrest under a warrant issued upon a complaint charging solely a violation of 18 U.S.C. § 1073 need not comply with this rule if the person arrested is transferred without unnecessary delay to the custody of appropriate state or local authorities in the district of arrest and an attorney for the government moves promptly, in the district in which the warrant was issued, to dismiss the complaint.	**(a) In General.** (1) Any person making an arrest must promptly take the arrested person before a federal judge or, if none is reasonably available, before a state or local officer. (2) When a person arrested without a warrant is brought before the judge, a complaint meeting Rule 4(a)'s requirement of probable cause must be filed promptly. (3) *An officer making an arrest under a warrant issued upon a complaint charging solely a violation of 18 U.S.C. § 1073 need not comply with this rule if the person arrested is transferred without unnecessary delay to the custody of appropriate state or local authorities in the district of arrest and an attorney for the government moves promptly, in the district in which the warrant was issued, to dismiss the complaint.*

(c) Offenses Not Triable by the United States Magistrate Judge. If the charge against the defendant is not triable by the United States magistrate judge, the defendant shall not be called upon to plead. The magistrate judge shall inform the defendant of the complaint against the defendant and of any affidavit filed therewith, of the defendant's right to retain counsel or to request the assignment of counsel if the defendant is unable to obtain counsel, and of the general circumstances under which the defendant may secure pretrial release. The magistrate judge shall inform the defendant that the defendant is not required to make a statement and that any statement made by the defendant may be used against the defendant. The magistrate judge shall also inform the defendant of the right to a preliminary examination. The magistrate judge shall allow the defendant reasonable time and opportunity to consult counsel and shall detain or conditionally release the defendant as provided by statute or in these rules. * * * * *	**(b) Felonies.** (1) If the offense charged is a felony, the judge must inform the defendant of the following: (A) the complaint against the defendant, and any affidavit filed with it; (B) the defendant's right to retain counsel or to request that counsel be appointed if the defendant cannot obtain counsel; (C) the circumstances under which the defendant may secure pretrial release; (D) any right to a preliminary hearing; and (E) the defendant's right not to make a statement, and that any statement made may be used against the defendant. (2) The judge must allow the defendant reasonable opportunity to consult counsel. (3) The judge must detain or conditionally release the defendant as provided by statute or these rules. (4) A defendant may be asked to plead only under Rule 10.
(b) Misdemeanors and Other Petty Offenses. If the charge against the defendant is a misdemeanor or other petty offense triable by a United States magistrate judge under 18 U.S.C. § 3401, the magistrate judge shall proceed in accordance with Rule 58.	**(c) Misdemeanors.** If a defendant is charged with a misdemeanor, the judge must inform the defendant in accordance with Rule 58(b)(2).

Committee Notes
Rule 5
September 8, 1999

COMMITTEE NOTE

Rule 5 has been amended to make the rule more easily understood. The Committee has also changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only. In addition, several substantive changes have been made.

Several changes have been made to Rule 5(a), which governs initial appearances by an arrested defendant before a magistrate judge. First, revised Rule 5(a)(1) now provides that a person making the arrest must bring the defendant "promptly" before a magistrate judge, instead of the current reference to "nearest available" magistrate. This language parallels that in Rule 4 and reflects the view that time is of the essence, regardless of the location of the judge before whom the defendant will appear. In *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), the Supreme Court used both terms interchangeably and the Committee intends no change here. The last sentence in current Rule 5(a) has been deleted as being unnecessary. As in other provisions throughout the rules, the preference is that the defendant be brought before a federal judicial officer. Only if a magistrate judge is not available should the defendant be taken before a state or local officer.

Rule 5(b), formerly Rule 5(c), has been retitled to more clearly reflect the subject of that subdivision, the procedure to be used if the defendant is charged with a felony. Rule 5(b)(4) has been added to make clear that a defendant may only be called upon to enter a plea under the provisions of Rule 10. That language is intended to reflect and reaffirm current practice.

Finally, the last portions of current Rule 5(c) have been moved to Rule 5.1,which deals with preliminary hearings in felony cases.

	Rule 5.1. Preliminary Hearing in a Felony Case Prior to Indictment or Information
	(a) In General. If charged with a felony prior to indictment or information,) a defendant is entitled to a preliminary hearing before a magistrate judge.
Rule 5(c) Offenses Not Triable by the United States Magistrate Judge. * * * * * A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court. If the defendant waives preliminary examination, the magistrate judge shall forthwith hold the defendant to answer in the district court. If the defendant does not waive the preliminary examination, the magistrate judge shall schedule a preliminary examination. Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if the defendant is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination.	**(b) Scheduling.** The **[court]** must hold a preliminary hearing within a reasonable time, but no later than 10 days after the initial appearance if the defendant is in custody and no later than 20 days if not in custody, unless: (1) the defendant waives the hearing; (2) the defendant is indicted; or (3) the government files an information.
With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times by a federal magistrate judge. In the absence of such consent by the defendant, time limits may be extended by a judge of the United States only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice	**(c) Extending the Time.** With the defendant's consent and upon a showing of good cause — taking into account the public interest in the prompt disposition of criminal cases — the **[court]** may extend the time limits in Rule 5.1(b) one or more times. If the defendant does not consent, the **[court]** may extend the time limits only on a showing that extraordinary circumstances exist and justice requires the delay.
Rule 5.1. Preliminary Examination. **(a) Probable Cause Finding.** If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the federal magistrate judge shall forthwith hold the defendant to answer in district court. The finding of probable cause may be based upon hearsay evidence in whole or in part. The defendant may cross-examine adverse witnesses and may introduce evidence. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12.	**(d) Probable-Cause Finding.** If the**[court]** finds probable cause to believe an offense has been committed and the defendant committed it, the **[court]** must promptly require the defendant to appear for further proceedings. The defendant may cross-examine adverse witnesses and may introduce evidence but cannot object to evidence on the ground that it was unlawfully acquired.

(b) Discharge of Defendant. If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the defendant committed it, the federal magistrate judge shall dismiss the complaint and discharge the defendant. The discharge of the defendant shall not preclude the government from instituting a subsequent prosecution for the same offense.	**(e) Discharging the Defendant.** If the **[court]** finds no probable cause to believe an offense has been committed or the defendant committed it, the **[court]** must dismiss the complaint and discharge the defendant. A discharge does not preclude the government from later prosecuting the defendant for the same offense.
(c) Records. After concluding the proceeding the federal magistrate judge shall transmit forthwith to the clerk of the district court all papers in the proceeding. The magistrate judge shall promptly make or cause to be made a record or summary of such proceeding. (1) On timely application to a federal magistrate judge, the attorney for a defendant in a criminal case may be given the opportunity to have the recording of the hearing on preliminary examination made available to that attorney in connection with any further hearing or preparation for trial. The court may, by local rule, appoint the place for and define the conditions under which such opportunity may be afforded counsel.	**(f) Records.** The preliminary hearing must be recorded by a court reporter or by a suitable recording device. The **[court]** may make the recording available to any party upon request. The court may provide a copy of the recording and the transcript to any party on request and any payment as required in accordance with applicable Judicial Conference regulations.
(2) On application of a defendant addressed to the court or any judge thereof, an order may issue that the federal magistrate judge make available a copy of the transcript, or of a portion thereof, to defense counsel. Such order shall provide for prepayment of costs of such transcript by the defendant unless the defendant makes a sufficient affidavit that the defendant is unable to pay or to give security therefor, in which case the expense shall be paid by the Director of the Administrative Office of the United States Courts from available appropriated funds. Counsel for the government may move also that a copy of the transcript, in whole or in part, be made available to it, for good cause shown, and an order may be entered granting such motion in whole or in part, on appropriate terms, except that the government need not prepay costs nor furnish security therefor.	
(d) Production of Statements. (1) In General. Rule 26.2(a)-(d) and (f) applies at any hearing under this rule, unless the court, for good cause shown, rules otherwise in a particular case. (2) Sanctions for Failure to Produce Statement. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, the court may not consider the testimony of a witness whose statement is withheld.	**(g) Production of Statements.** (1) ***In General.*** Rule 26.2(a)-(d) and (f) applies at any hearing under this rule, unless the **[court]**, for good cause shown, rules otherwise in a particular case. (2) ***Sanctions for Failure to Produce Statement.*** If a party disobeys a Rule 26.2(a) order to deliver a statement to the moving party, the **[court]** must not consider the testimony of a witness whose statement is withheld.

Committee Notes
Rule 5.1
September 8, 1999

COMMITTEE NOTE

Rule 5.1 has been amended to make the rule more easily understood. The Committee has also changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only. In addition, several substantive changes have been made to the Rule.

First, the title of the rule has been changed. Although the statute uses the phrase *preliminary examination*, the Committee believes that the phrase *preliminary hearing* is more accurate. What happens at this proceeding is more than just an examination; it includes an evidentiary hearing, argument, and a judicial ruling. Further, the phrase *preliminary hearing* predominates in actual usage.

Rule 5.1(a) is composed of the first sentence of the second paragraph of current Rule 5(c). Rule 5.1(b) now includes material formerly located in Rule 5(c): scheduling and extending the time limits for the hearing. Although the rule continues to refer to proceedings before a "court," the Committee recognizes that in many districts, magistrate judges perform these functions. That point is also referenced in the definition of "court" in Rule 1(b) that in turn recognizes that magistrate judges may be authorized to act.

Rule 5.1(d), which addresses the issue of probable cause, contains the language formerly located in Rule 5.1(a), with the exception of the sentence, "The finding of probable cause may be based upon hearsay evidence in whole or in part." That language was included in the original promulgation of the rule in 1972. Similar language was added to Rule 4 in 1974. In a lengthy discussion of the issue, the Advisory Committee explained that the language was included to make it clear that a finding of probable cause may be based upon hearsay, noting that there had been some uncertainty in the federal system about the propriety of relying upon hearsay at the preliminary examination. *See* Advisory Committee Note to Rule 5.1 (citing cases and commentary). Federal law is now clear on that proposition. Thus, the Committee believed that the reference to hearsay was no longer necessary. Further, the Committee believed that the matter was best addressed in Rule 1101(d)(3), Federal Rules of Evidence. That rule explicitly indicates that the Federal Rules of Evidence do not apply to "preliminary examinations in criminal cases,...issuance of warrants for arrest, criminal summonses, and search warrants." The Advisory Committee Note accompanying that rule recognizes that: "The nature of the proceedings makes application of the formal rules of evidence inappropriate and

impracticable. The Committee did not intend to make any substantive changes in practice by deleting the reference to hearsay evidence.

Rule 5.1(c) includes new language that expands the authority of a United States Magistrate Judge to determine whether to grant a continuance for a preliminary examination conducted under the Rule. Currently, the magistrate judge's authority to do so is limited to those cases in which the defendant has consented to the continuance. If the defendant does not consent, then the government must present the matter to a district court judge, usually on the same day. The proposed amendment currently conflicts with 18 U.S.C. § 3060, which tracks the original language of the rule and permits only district court judges to grant continuances where the defendant objects. The Committee believes that this restriction is an anomaly. The currently required procedure can lead to needless consumption of judicial and other resources. Magistrate judges are routinely required to make probable cause determinations and other difficult decisions regarding the defendant's liberty interests, reflecting that the magistrate's role has developed toward a higher level of responsibility for pre-indictment matters. The Committee believes that the change in the rule will provide greater judicial economy and that it is entirely appropriate to seek a change to the rule through the Rules Enabling Act procedures. 28 U.S.C. § 2072(b). Under those procedures, approval by Congress of this rule change would supersede 18 U.S.C. § 3060.

Rule 5.1(e), which deals with the discharge of a defendant, consists of former Rule 5.1(b).

Rule 5.1(f) is a revised version of the material in current Rule 5.1(c). Instead of including detailed information in the rule itself concerning records of preliminary hearings, the Committee opted simply to direct the reader to the applicable Judicial Conference guidelines.

III. INDICTMENT AND INFORMATION	**Title III. The Grand Jury, The Indictment, and The Information**
Rule 6. The Grand Jury	**Rule 6. The Grand Jury**
(a) Summoning Grand Juries. **(1) Generally.** The court shall order one or more grand juries to be summoned at such time as the public interest requires. The grand jury shall consist of not less than 16 nor more than 23 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement. **(2) Alternate Jurors.** The court may direct that alternate jurors may be designated at the time a grand jury is selected. Alternate jurors in the order in which they were designated may thereafter be impanelled as provided in subdivision (g) of this rule. Alternate jurors shall be drawn in the same manner and shall have the same qualifications as the regular jurors, and if impanelled shall be subject to the same challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors.	**(a) Summoning a Grand Jury.** **(1)** ***In General.*** When the public interest so requires, the **[court]** must order that one or more grand juries be summoned. A grand jury must have 16 to 23 members, and the court must order that enough legally qualified persons be summoned to meet this requirement. **(2)** ***Alternate Jurors.*** When a grand jury is selected, the court may designate alternate jurors. They must be drawn and summoned in the same manner and must have the same qualifications as regular jurors. Alternate jurors will be impaneled in the sequence in which they are designated. If impaneled, an alternate juror is subject to the same challenges, takes the same oath, and has the same functions, duties, powers, and privileges as a regular juror.
(b) Objections to Grand Jury and to Grand Jurors. **(1) Challenges.** The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court. **(2) Motion to Dismiss.** A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. It shall be made in the manner prescribed in 28 U.S.C. § 1867(e) and shall be granted under the conditions prescribed in that statute. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.	**(b) Objections to the Grand Jury or to a Grand Juror.** **(1)** ***Challenges.*** Either the government or a defendant may challenge the grand jury on the ground that it was not lawfully drawn, summoned, or selected, and may challenge an individual juror on the ground that the juror is not legally qualified. **(2)** ***Motion to Dismiss an Indictment.*** A party may move to dismiss the indictment based on an objection to the grand jury or on an individual juror's lack of legal qualification, unless the **[court]** has previously ruled on the same objection under Rule 6(b)(1). The motion to dismiss is governed by 28 U.S.C. § 1867(e). The court cannot dismiss the indictment on the ground that a grand juror was not legally qualified if the record shows that at least 12 qualified jurors concurred in the indictment.

(c) Foreperson and Deputy Foreperson. The court shall appoint one of the jurors to be foreperson and another to be deputy foreperson. The foreperson shall have power to administer oaths and affirmations and shall sign all indictments. The foreperson or another juror designated by the foreperson shall keep record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. During the absence of the foreperson, the deputy foreperson shall act as foreperson.	**(c) Foreperson and Deputy Foreperson.** The **[court]** will appoint one juror as the foreperson and another as the deputy foreperson. In the foreperson's absence, the deputy foreperson will act as the foreperson. The foreperson may administer oaths and affirmations and will sign all indictments. The foreperson — or another juror designated by the foreperson — will record the number of jurors concurring in every indictment and will file the record with the district clerk, but the record may not be made public unless the **[court]** so orders.
(d) Who May Be Present. **(1) While Grand Jury is in Session.** Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session. **(2) During Deliberations and Voting.** No person other than the jurors, and any interpreter necessary to assist a juror who is hearing or speech impaired, may be present while the grand jury is deliberating or voting.	**(d) Who May Be Present.** (1) ***While the Grand Jury Is in Session.*** The following persons may be present while the grand jury is in session: government attorneys, the witness being questioned, interpreters when needed, and a stenographer or operator of a recording device. (2) ***During Deliberations and Voting.*** No person other than the jurors, and any interpreter needed to assist a hearing-impaired or speech-impaired juror, may be present while the grand jury is deliberating or voting.

(e) Recording and Disclosure of Proceedings. **(1) Recording of Proceedings.** All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case. **(2) General Rule of Secrecy.** A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.	**(e) Recording and Disclosing Proceedings.** **(1)** ***Recording the Proceedings.*** Except while the grand jury is deliberating or voting, all proceedings must be recorded by a court reporter or by a suitable recording device. The validity of a prosecution is not affected by the unintentional failure to make a recording. Unless the **[court]** orders otherwise, a government attorney will retain control of the recording, the reporter's notes, and any transcript prepared from those notes. **(2)** ***General Rule of Secrecy.*** Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury: (A) a grand juror; (B) an interpreter; (C) a court reporter; (D) an operator of a recording device; (E) a person who transcribes recorded testimony; (F) a government attorney; or (G) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii).

(3) Exceptions. (A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to— (i) an attorney for the government for use in the performance of such attorney's duty; and (ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law. (B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of their obligation of secrecy under this rule.	**(3) *Exceptions.*** (A) Disclosure of a grand-jury matter — other than the grand jury's deliberations or any grand juror's vote — may be made to: (i) a government attorney for use in performing that attorney's duty; or (ii) any government personnel — including those of a state or state subdivision or of an Indian tribe — that a government attorney considers necessary to assist in performing that attorney's duty to enforce federal criminal law. (B) A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist a government attorney in performing that attorney's duty to enforce federal criminal law. A government attorney must promptly provide the **[court]** that impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made— (i) when so directed by a court preliminarily to or in connection with a judicial proceeding; (ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury; (iii) when the disclosure is made by an attorney for the government to another federal grand jury; or (iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law. If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.	(C) A government attorney may disclose any grand-jury matter to another federal grand jury. (D) The **[court]** may authorize disclosure — at a time, in a manner, and subject to any other conditions that it directs — of a grand-jury matter: (i) preliminarily to or in connection with a judicial proceeding; (ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury; (iii) at the request of the government if it shows that the matter may disclose a violation of state or Indian tribal criminal law, as long as the disclosure is to an appropriate state, state-subdivision, or Indian tribal official for the purpose of enforcing that law; or (iv) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.
(D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened. Unless the hearing is ex parte, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard.	(E) A petition to disclose a grand jury matter under Rule 6(e)(3)(D)(i) must be filed in the district where the grand jury convened. Unless the hearing is ex parte — as it may be when the government is the petitioner — the petitioner must serve the petition on, and the **[court]** must afford a reasonable opportunity to appear and be heard to: (i) the government attorney; (ii) the parties to the judicial proceeding; and (iii) any other person whom the **[court]** may designate.

(E) If the judicial proceeding giving rise to the petition is in a federal district court in another district, the court shall transfer the matter to that court unless it can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper. The court shall order transmitted to the court to which the matter is transferred the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy. The court to which the matter is transferred shall afford the aforementioned persons a reasonable opportunity to appear and be heard.	(F) If the petition to disclose arises out of a proceeding in another district, the petitioned **[court]** must transfer the petition to the other **[court]** unless the petitioned **[court]** can reasonably determine whether disclosure is proper. If the petitioned **[court]** decides to transfer, it must send to the transferee **[court]** the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand-jury secrecy. The transferee **[court]** must afford those persons identified in Rule 6(e)(3)(E) a reasonable opportunity to appear and be heard.
(4) Sealed Indictments. The federal magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons. **(5) Closed Hearing.** Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury. **(6) Sealed Records.** Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.	**(4)** ***Sealed Indictment.*** The magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. The clerk must then seal the indictment, and no person may disclose the indictment's existence except as necessary to issue or execute a warrant or summons. **(5)** ***Closed Hearing.*** Subject to any right to an open hearing in a contempt proceeding, the **[court]** must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury. **(6)** ***Sealed Records.*** Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury. **(7)** ***Contempt.*** A knowing violation of Rule 6 may be punished as a contempt of court.

(f) Finding and Return of Indictment. A grand jury may indict only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury, or through the foreperson or deputy foreperson on its behalf, to a federal magistrate judge in open court. If a complaint or information is pending against the defendant and 12 persons do not vote to indict, the foreperson shall so report to a federal magistrate judge in writing as soon as possible.	**(f) Indictment and Return.** A grand jury may indict only if at least 12 jurors concur. The grand jury — or its foreperson — must return the indictment to a magistrate judge in open court. If a complaint or information is pending against the defendant and 12 jurors do not concur in the indictment, the foreperson must promptly and in writing report the lack of concurrence to the magistrate judge.
(g) Discharge and Excuse. A grand jury shall serve until discharged by the court, but no grand jury may serve more than 18 months unless the court extends the service of the grand jury for a period of six months or less upon a determination that such extension is in the public interest. At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another person in place of the juror excused.	**(g) Discharge.** A grand jury must serve until the **[court]** discharges it, but it may serve more than 18 months only if the **[court]**, having determined that an extension is in the public interest, extends the grand jury's service for no more than 6 months. **(h) Excuse.** At any time, for good cause, the **[court]** may excuse a juror either temporarily or permanently, and if permanently, the **[court]** may impanel an alternate juror in place of the excused juror. **(i) Indian Tribe.** Indian tribe means an Indian tribe recognized by the Secretary of the Interior on a list published in the Federal Register under 25 U.S.C. § 479a-1.

Committee Notes
Rule 6
September 8, 1999

COMMITTEE NOTE

Rule 6 has been amended to make the rule more easily understood. The Committee has also changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only. In addition, the amended rule includes several substantive changes.

The first substantive change is in Rule 6(b)(1). The last sentence of current Rule 6(b)(1) indicates that "Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court." That language has been deleted from the amended rule. The thrust of this subdivision rests on the assumption that some formal proceedings have begun against a person, i.e. the indictment. The Committee believed that although the first sentence reflects current practice of a defendant being able to challenge the composition or qualifications of the grand jurors after the indictment is returned, the second sentence does not comport with modern practice. That is, a defendant will normally not know the composition or identity of the grand jurors before they are administered their oath. Thus, the opportunity to challenge them and have the court decide the issue before the oath is given, is not possible.

In Rule 6(d)(1), the term court "stenographer" has been changed to "court reporter." Similar changes have been made in Rule 6(e)(1) and (2). **[The language in Rule 6(d)(2) regarding the presence of interpreters has been approved by the Supreme Court and is now before Congress]**

Rule 6(e) continues to spell out the general rule of secrecy of grand jury proceedings and the exceptions to that general rule. The last sentence in current Rule 6(e)(2) concerning contempt for violating Rule 6 now appears in Rule 6(e)(7). No change in substance is intended.

[Query: A footnote in a earlier draft indicated that Professor Saltzburg was researching the issue of whether the language in the first sentence of Rule 6(e)(3) "otherwise prohibited by these rules" could be omitted as suggested by the SSC. Has this matter been resolved?]

Rule 6(e)(3)(A)(ii) includes a new provision recognizing the sovereignty of Indian Tribes and the possibility that it would necessary to disclose grand jury information to such persons in order to enforce federal law. Similar language has been added to Rule 6(e)(3)(D)(iii).

Rule 6(e)(3)(C) consists of language located in current Rule 6(e)(3)(C)(iii). The Committee believed that that provision, which recognizes that prior court approval is not required for such disclosure, would be more appropriately treated as a separate subdivision under Rule (e)(3). No change in practice is intended.

[This is new material inserted at the suggestion of Judge Roll: The Committee considered amending Rule 6(e)(3)(D)(i) and (ii) (current Rule 6(e)(3)(C)(i) and (ii)) to reflect a "particularized need" requirement that some courts have imposed. *See, e.g.*, Douglas Oil v. Petrol Stops Northwest, 441 U.S. 211, 216 (1979); Dennis v. United States, 384 U.S. 855, 869-870 (1966); United States v. Mahon, 938 F.2d 1501, 1504 (1st Cir. 1991); United States v. Evans & Assocs. Const. Co., 839 F.2d 656, 658 (10th Cir. 1988); United States v. Watts, 502 F.2d 726, 728 (9th Cir. 1974). Ultimately, the Committee decided to leave to the courts the development of any such requirement.

Rule 6(e)(D)(iv) is a new provision that addresses disclosure of grand jury information to armed forces personnel where the disclosure is for the purpose of enforcing military criminal law under the Uniform Code of Military Justice, 10 U.S.C. §§ 801-946. *See*, e.g., Department of Defense Directive 5525.7 (January 22, 1985); 1984 Memorandum of Understanding Between Department of Justice and Department of Justice; Memorandum of Understanding Between the Departments of Justice and Transportation (Coast Guard) Relating to the Investigations and Prosecution of Crimes Over Which the Two Departments Have Concurrent Jurisdiction (October 9, 1967).

In Rule 6(e)(3)(E)(i), the Committee considered whether to amend the language relating to "parties to the judicial proceeding" and determined that in the context of the rule, it was understood that the parties referred to are the parties in the same judicial proceeding identified in Rule 6(e)(3)(D)(I).

The Committee determined to leave in subdivision (e) the provision stating that a "knowing violation of Rule 6" may be punished by contempt notwithstanding that, due to its apparent application to the entirety of the Rule, the provision seemingly is misplaced in subdivision (e). Research shows that the provision was added by Congress in 1977 and that it was crafted solely to deal with violations of the secrecy prohibitions in subdivision (e). *See* S. Rep. No. 95-354, p. 8 (1977). Supporting this narrow construction, the Committee could find no reported decision involving an application or attempted use of the contempt sanction to a violation other than of the disclosure restrictions in subdivision (e). On the other hand, the Supreme Court in dicta did indicate on one occasion its understanding that the contempt sanction would be available also for a violation of Rule 6(d) relating to who may be present during the grand jury's deliberations. Bank of Nova Scotia v. United States, 487 U.S. 250, 263 (1987).

In sum it appears that the scope of the contempt sanction in Rule 6 is

unsettled. Because the provision creates an offense, it is arguably beyond the authority bestowed by the Rules Enabling Act, 28 U.S.C. 2071 et seq., to alter its purview. *See* 28 U.S.C. 2072(b) (Rules must not "abridge, enlarge, or modify any substantive right"). For this reason, the Committee determined to leave the contempt provision in its present location in subdivision (e), because breaking it out into a separate subdivision could be construed to support the interpretation that the sanction may be applied to a knowing violation of any of the Rule's provisions rather than just those in subdivision (e). Whether or not that is a correct interpretation of the provision—a matter on which the Committee takes no position—must be determined by caselaw, or resolved by Congress.

[Rule 6(f) language has been approved by the Supreme Court and is now pending at Congress]

Current Rule 6(g) has been divided into two new subdivisions, Rule 6(g), Discharge and Rule 6(h), Excuse.

Rule 6(i) is a new provision defining the term "Indian Tribe."

Rule 7. The Indictment and the Information	Rule 7. The Indictment and the Information
(a) Use of Indictment or Information. An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.	**(a) When Used.** (1) ***Felony.*** An offense must be prosecuted by an indictment if it is punishable: (A) by death; or (B) by imprisonment for more than one year, unless the defendant waives indictment. (2) Misdemeanor. An offense punishable by imprisonment for one year or less may be prosecuted by indictment or information in accordance with Rule 58(b)(1).
(b) Waiver of Indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor may be prosecuted by information if the defendant, after having been advised of the nature of the charge and of the rights of the defendant, waives in open court prosecution by indictment.	**(b) Waiving Indictment.** An offense punishable by imprisonment for more than one year may be prosecuted by information if the defendant — in open court and after being advised of the nature of the charge and of the defendant's rights — waives prosecution by indictment.

(c) Nature and Contents. **(1) In General.** The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. **(2) Criminal Forfeiture.** No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information provides notice that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute.[1] **(3) Harmless Error.** Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice.	**(c) Nature and Contents.** **(1)** ***In General.*** The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by a government attorney. It need not contain a formal introduction or conclusion. A count may incorporate by reference an allegation made in another count. A count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. For each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated. **(2)** ***Criminal Forfeiture.*** No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information provides notice that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute. **(3)** ***Citation Error.*** Unless the defendant was misled and thereby prejudiced, neither an error in a citation nor a citation's omission is a ground to dismiss the indictment or information or to reverse a conviction.
(d) Surplusage. The court on motion of the defendant may strike surplusage from the indictment or information.	**(d) Surplusage.** On the defendant's motion, the **[court]** may strike surplusage from the indictment or information.
(e) Amendment of Information. The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.	**(e) Amending an Information.** Unless an additional or different offense is charged or a substantial right of the defendant is prejudiced, the **[court]** may permit an information to be amended at any time before verdict or finding.
(f) Bill of Particulars. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.	**(f) Bill of Particulars.** The **[court]** may direct the government to file a bill of particulars. The defendant may move for a bill of particulars before or within 10 days after arraignment or at a later time if the **[court]** permits. The government may amend a bill of particulars subject to such conditions as justice requires.

[1]Judicial Conference approved amendment in March 1999.

Committee Notes
Rule 7
September 8, 1999

COMMITTEE NOTE

Rule 7 has been amended to make the rule more easily understood. The Committee has also changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only. In addition, the amended rule includes several substantive changes.

The Committee has deleted the references to "hard labor" in the Rule. This punishment is not found in current federal statutes or part of the Federal Sentencing Guidelines.

[Rule 7(c)(2), Criminal Forfeiture, is language approved by the Judicial Conference but not yet by the Supreme Court]

The title of Rule 7(c)(3) has been amended. The Committee believed that potential confusion could arise with the use of the term "harmless error." Rule 52, which deals with the issue of harmless error and plain error, is sufficient to address the topic. Potentially, the topic of harmless error could arise with regard to any of the other rules and that there was insufficient need to highlight the term in Rule 7. The focus in the language of (c)(3), on the other hand is specifically on the topic of the effect of an error in the citation of authority in the indictment; that material remains but without any reference to harmless error.

Rule 8. Joinder of Offenses and of Defendants	Rule 8. Joinder of Offenses or Defendants
(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.	**(a) Joinder of Offenses.** The indictment or information may charge a defendant in separate counts with two or more offenses if the offenses charged — whether felonies or misdemeanors or both — are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.
(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.	**(b) Joinder of Defendants.** The indictment or information may charge two or more defendants if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

Committee Notes
Rule 8
September 8, 1999

COMMITTEE NOTE

Rule 8 has been amended to make the rule more easily understood. The Committee has also changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only.

Rule 9. Warrant or Summons Upon Indictment or Information	Rule 9. Arrest Warrant or Summons on an Indictment or Information
(a) Issuance. Upon the request of the attorney for government the court shall issue a warrant for each defendant named in an information supported by a showing of probable cause under oath as is required by Rule 4(a), or in an indictment. Upon the request of the attorney for the government a summons instead of a warrant shall issue. If no request is made, the court may issue either a warrant or a summons in its discretion. More than one warrant or summons may issue for the same defendant. The clerk shall deliver the warrant or summons to the marshal or other person authorized by law to execute or serve it. If a defendant fails to appear in response to the summons, a warrant shall issue. When a defendant arrested with a warrant or given a summons appears initially before a magistrate judge, the magistrate judge shall proceed in accordance with the applicable subdivisions of Rule 5.	**(a) Issuance.** The **[court]** must issue a warrant — or at the government's request, a summons — for each defendant named in an indictment or named in an information if one or more affidavits accompanying the information establish probable cause to believe that an offense has been committed and that the defendant committed it. More than one warrant or summons may issue for the same defendant. If a defendant fails to appear in response to a summons, the **[court]** may, and upon request of the government attorney must, issue a warrant. The **[court]** must issue the arrest warrant to an officer authorized to execute it or the summons to a person authorized to serve it.
(b) Form. **(1) Warrant.** The form of the warrant shall be as provided in Rule 4(c)(1) except that it shall be signed by the clerk, it shall describe the offense charged in the indictment or information and it shall command that the defendant be arrested and brought before the nearest available magistrate judge. The amount of bail may be fixed by the court and endorsed on the warrant. **(2) Summons.** The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate judge at a stated time and place.	**(b) Form.** **(1)** ***Warrant.*** The warrant must conform to Rule 4(b)(1) except that it must be signed by the clerk and must describe the offense charged in the indictment or information. **(2)** ***Summons.*** The summons is to be in the same form as a warrant except that it must require the defendant to appear before a magistrate judge at a stated time and place.
(c) Execution or Service; and Return. **(1) Execution or Service.** The warrant shall be executed or the summons served as provided in Rule 4(d)(1), (2) and (3). A summons to a corporation shall be served by delivering a copy to an officer or to a managing or general agent or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the corporation's last known address within the district or at its principal place of business elsewhere in the United States. The officer executing the warrant shall bring the arrested person without unnecessary delay before the nearest available federal magistrate judge or, in the event that a federal magistrate judge is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041.	**(c) Execution or Service; Return; Initial Appearance.** **(1)** ***Execution or Service.*** (A) The warrant must be executed or the summons served as provided in Rule 4(c)(1), (2), and (3). (B) The officer executing the warrant must proceed in accordance with Rule 5(a)(1).

(2) Return. The officer executing a warrant shall make return thereof to the magistrate judge or other officer before whom the defendant is brought. At the request of the attorney for the government any unexecuted warrant shall be returned and cancelled. On or before the return day the person to whom a summons was delivered for service shall make return thereof. At the request of the attorney for the government made at any time while the indictment or information is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the clerk to the marshal or other authorized person for execution or service.	(2) ***Return.*** A warrant or summons will be returned in accordance with Rule 4(c)(4). (3) ***Initial Appearance.*** When an arrested or summoned defendant first appears before the **[court]**, the judge must proceed under Rule 5.
[(d) Remand to United States Magistrate for Trial of Minor Offenses] (Abrogated Apr. 28, 1982, eff. Aug. 1, 1982).	

Committee Notes
Rule 9
September 8, 1999

COMMITTEE NOTE

The amendments to Rule 9 are intended to make the rule more easily understood. The Committee has also changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only. The amended rule, however, includes several substantive changes.

Rule 9 has been changed to reflect its relationship to Rule 4 procedures for obtaining an arrest warrant or summons. Thus, rather than simply repeating material that is already located in Rule 4, the Committee determined that where appropriate, Rule 9 should simply direct the reader to the procedures specified in Rule 4.

Rule 9(a) has been amended to permit some discretion in whether to issue an arrest warrant if the defendant fails to respond to a summons. Under the current language of the rule, if the defendant fails to appear, the judge must issue a warrant. Under the amended version, if the defendant fails to appear and the government requests that a warrant be issued, the judge must issue one. In the absence of such a request, the judge has the discretion whether to do so. This mirrors language in amended Rule 4(a).

Rule 9(b)(1) has been amended to delete language that indicates that the amount of bail may be fixed by the court on the warrant. The Committee believes that that language is now inconsistent with the 1984 Bail Reform Act. *See United States v. Thomas*, 992 F. Supp. 782 (D. Virgin Islands 1998) (bail amount endorsed on warrant that has not been determined in proceedings conducted under Bail Reform Act has no bearing on decision by judge conducting Rule 40 hearing).

The language in current Rule 9(c)(1) concerning service of a summons on an organization has been moved to Rule 4.

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Restyling Project — Rules 10 to 22 (Second Draft of Rules and First Draft of Notes)**

DATE: **September 9, 1999**

In June, the Committee considered the first draft of Rules 10 through 22. Changes made at that meeting are reflected in the attached draft (Date September 7, 1999). Also attached are proposed Committee Notes for those rules.

Finally, the Style Subcommittee has proposed changes to the Committee's draft; those suggested changes are also attached. Please note that at this point, Subcommittee B has not reviewed those suggested changes from the Style Subcommittee.

This draft does not include any proposed substantive changes to Rules 10 (on videoconferencing) or 12.2, that appear separately on the agenda.

IV. ARRAIGNMENT, AND PREPARATION FOR TRIAL	**Title IV. Arraignment and Preparation for Trial**
Rule 10. Arraignment[1]	**Rule 10. Arraignment**
Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to the defendant the substance of the charge and calling on[2] the defendant to plead thereto. The defendant shall be given a copy of the indictment or information before being called upon to plead. [3]	**(a) In General.** Arraignment must be conducted in open court and must consist of: (1) ensuring that the defendant has a copy of the indictment or information; (2) reading the indictment or information to the defendant or stating to the defendant the substance of the charge; and then (3) asking the defendant to plead to the indictment or information. **(b) Waiving Appearance.** A defendant need not be present for the arraignment if: (1) the defendant has been charged by indictment or misdemeanor information; (2) the defendant, in a written waiver signed by both the defendant and defense counsel, has waived appearance and has affirmed that the defendant received a copy of the indictment or information and that the plea is not guilty; and (3) the court accepts the waiver.

[1] Matter underlined and struck out reflect changes generally approved by full advisory committee, subject to edit by SSC.

[2] See note 42.

[3] Ditto.

COMMITTEE NOTE

Rule 10 has been amended to make the rule more easily understood. The Committee has also changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only. Several substantive changes have been made, however.

Read together, Rules 10 and 43 require the defendant to be present in court for the arraignment. *See, e.g., Valenzuela-Gonzales v. United States*, 915 F.2d 1276, 1280 (9th Cir. 1990)(Rules 10 and 43 are broader in protection than the Constitution). The amendment to Rule 10, creates an exception to that rule and provides that the court may permit arraignments when the defendant has waived the right to be present in writing and the court consents to that waiver. A conforming amendment has also been made to Rule 43.

In amending the rule, and Rule 43, the Committee was very much aware of the argument that permitting a defendant to be absent from the arraignment could be viewed as an erosion of an important element of the judicial process. First, it may be important for a defendant to see, and experience first-hand the formal impact of the reading of the charge. Second, it may be necessary for the court to personally see and speak with the defendant at the arraignment, especially where there is a real question whether the defendant really understands the gravity of the proceedings. And third, there may be difficulties in providing the defendant with effective and confidential assistance of counsel if counsel, but not the defendant, appears at the arraignment.

The Committee nonetheless believed that in appropriate circumstances the court, and the defendant, should have the option of conducting the arraignment in the absence of the defendant. The question of when it would be appropriate for a defendant to waive his or her appearance is not spelled out in the rule. That is left to the defendant and the court in each case.

A critical element to the amendment is that no matter how convenient or cost effective a defendant's waiver might be, the defendant's right be present in court stands unless he or she waives that right. As with other rules including an element of waiver, whether a defendant voluntarily waived the right to be present in court during an arraignment will be measured by the same standards. An effective means of meeting that requirement in Rule 10 is to require that any waiver of the right be in writing. Under the amendment, the waiver must be signed by both the defendant and his or her attorney, if one is representing the defendant. Further, the amendment requires that the waiver specifically state that the defendant has received a copy of the charging instrument and understands it.

If the trial court has reason to believe that in a particular case the defendant should not be permitted to waive the right, the court may reject the waiver and require that the defendant actually appear in court. That might be particularly appropriate where the court wishes to discuss substantive or procedural matters in conjunction with the arraignment and the court believes that the defendant's presence is important in resolving those matters.

The amendment does not permit waiver of an appearance where the defendant is charged with a felony information. In that instance, the defendant is required by Rule 7(b) to be present in court to waive the indictment. Nor does the amendment permit a waiver of appearance where the defendant is standing mute, see Rule 11(a)(4) or entering a conditional plea, see Rule 11(a)(2), a no contest plea, see Rule 11(a)(3), or a guilty plea, see Rule 11(a)(1). In each of those instances the Committee believed that it was more appropriate for the defendant to appear personally before the court.

Rule 11. Pleas	Rule 11. Pleas
(a) Alternatives. **(1) In General.** A defendant may plead guilty, not guilty, or nolo contendere. If a defendant refuses to plead, or if a defendant organization, as defined in 18 U.S.C. § 18, fails to appear, the court shall enter a plea of not guilty.[4] **(2) Conditional Pleas.** With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.	**(a) Entering a Plea.** (1) ***In General.*** A defendant may plead guilty, not guilty, or (with the court's consent) no contest. (2) ***Conditional Plea.*** With the consent of the court and government, a defendant may enter a conditional plea of guilty or no contest, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.
(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.	(3) ***No Contest Plea.*** Before accepting a plea of no contest, the court must consider the parties' views and the public interest in the effective administration of justice. (4) ***Failure to Enter a Plea.*** If a defendant refuses to **[enter a plea]** plead or if a defendant organization fails to appear, the court must enter a plea of not guilty.

[4] This new language is not yet a part of the rule. It has been approved by the Judicial Conference and will be acted on by the Supreme Court before May 1, 1999.

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following: **(1)** the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and **(2)** if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding, and, if necessary, one will be appointed to represent the defendant; and **(3)** that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and **(4)** that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and **(5)** if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement; and	**(b) Consideration and Acceptance of a Guilty or No Contest Plea.** (1) ***Advising and Questioning the Defendant.*** Before the court accepts a plea of guilty or no contest, the defendant must be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following: (A) any statement that the defendant gives under oath may be used against the defendant in a later prosecution for perjury or false statement. (B) the right to plead not guilty, or having already so pleaded, to persist in that plea; (C) the right to a jury trial; (D) the right to be represented by counsel — and if necessary have the court appoint counsel — at trial and at every other stage of the proceeding; (E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses; (F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or no contest; (G) the nature of the charge to which the defendant is pleading;

(6) the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence.[5]	(H) any maximum possible penalty, including imprisonment, fine, special assessment, forfeiture, restitution, and term of supervised release; (I) any mandatory minimum penalty; (J) the court's obligation to apply the sentencing guidelines, and the court's authority to depart from those guidelines under some circumstances; and (K) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.
(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.[6]	(2) ***Ensuring That a Plea Is Voluntary.*** Before accepting a plea of guilty or no contest, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement). (3) ***Determining the Factual Basis for a Plea.*** Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

[5]This new language is not yet a part of the rule. It has been approved by the Judicial Conference and will be acted on by the Supreme Court before May 1, 1999.

[6] The language in this sentence (in the left column) apparently resulted from *Santobello v. New York*, 404 U.S. 257, 261-62 (1971). Obviously, there are "prior discussions" that lead to a plea agreement. The reference to "promises apart from the plea agreement" in the preceding sentence addresses the same subject. Professor Saltzburg recommended deleting the sentence.

(e) Plea Agreement Procedure.	(c) Plea Agreement Procedure.
(1) **In General.** The attorney for the government and the attorney for the defendant — or the defendant when acting pro se — may agree that, upon the defendant's entering a plea of guilty or nolo contendere to a charged offense, or to a lesser or related offense, the attorney for the government will: (A) move to dismiss other charges; or (B) recommend, or agree not to oppose the defendant's request for a particular sentence or sentencing range, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Any such recommendation or request is not binding on the court; or (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Such a plea agreement is binding on the court once it is accepted by the court. The court shall not participate in any discussions between the parties concerning any such plea agreement.[7]	(1) ***In General.*** The government attorney and the defendant's attorney, or the defendant when proceeding pro se, may discuss and agree to a plea. The court must not participate in these discussions. If the defendant pleads guilty or no contest to either the charged offense or a lesser or related offense, the plea agreement may specify that the government's attorney will: (A) not bring, or will move to dismiss, other charges; (B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable (with the understanding that the recommendation or request does not bind the court); or (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable (such a plea agreement binds the court once the court accepts it).

[7]This new language is not yet a part of the rule. It has been approved by the Judicial Conference and will be acted on by the Supreme Court before May 1, 1999.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, upon a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.	(2) ***Disclosing a Plea Agreement.*** **(A) Except for good cause, the parties must inform the court of the existence of a plea agreement at the arraignment, or at some other time, prior to trial, as established by the court.** (Further study on whether to eliminate it.) (B) The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.
(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.	(3) ***Judicial Consideration of a Plea Agreement*** (A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report. (B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request. (4) ***Accepting a Plea Agreement.*** If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11 (c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.	(5) ***Rejecting a Plea Agreement.*** If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must on the record: (A) inform the parties that the court rejects the plea agreement; (B) advise the defendant personally in open court — or, for good cause, in camera — that the court may not follow the plea agreement and give the defendant an opportunity to withdraw the plea; and (C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.
(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.[8]	**(d) *Withdrawing a Guilty or No Contest Plea.*** A defendant may withdraw a plea of guilty or no contest as follows: (1) Before the court accepts a plea of guilty or a plea of no contest, for any, or no, reason. (2) After the court accepts a plea of guilty or no contest, but before it imposes sentence if: (A) the court rejects a plea agreement under Rule 11(c)(5); or (B) the defendant can show fair and just reasons for requesting the withdrawal. **(e) *Finality of Guilty or No Contest Plea.*** After the court imposes sentence the defendant may not withdraw a plea of guilty or no contest and the plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

[8] This language in the left column has been incorporated into the new Rule 11(e)(2)(A).

(6) Inadmissibility of Pleas, Plea Discussions, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions: **(A)** a plea of guilty which was later withdrawn; **(B)** a plea of nolo contendere; **(C)** any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or **(D)** any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made in by the defendant under oath, on the record, and in the presence of counsel.	**(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements.** Except as otherwise provided in this subdivision, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions: (1) a plea of guilty which was later withdrawn; (2) a plea of no contest; (3) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or (4) any statement made in the course of plea discussions with an **[government attorney]** attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.
(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.	
(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.	**(g) Recording the Proceedings.** The proceedings during which the defendant enters a plea must be recorded verbatim by a court reporter or by a suitable recording device. If there is a guilty plea or a no contest plea, the record must include the inquiries and advice to the defendant required under Rule 11(c), (d), and (f).

(h) Harmless Error. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.	**(h) Harmless Error.** A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

COMMITTEE NOTE

Rule 11 has been completely reorganized and amended to make the rule more easily understood. The Committee has also changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only. Several substantive changes have been made, however.

First, amended Rule 11(b)(1) requires the court to apprise the defendant of his or her rights before accepting a plea of guilty or no contest. Although the current rule includes a list of matters that must be included in that advice, the amended rule adds to that list and explicitly includes a requirement that the defendant be sworn before answering the court's questions. In adding that requirement, the Committee was aware of the fact that many judges already require the defendant to be placed under oath. The Committee believed that doing so would impress the defendant with the need to be candid and truthful during the colloquy with the court.

The Committee considered whether to address the practice in some courts of using judges to facilitate plea agreements. The current rule indicates that "the court shall not participate in any discussions between the parties concerning such plea agreement." Some courts apparently believe that that language acts as a limitation only upon the judge taking the defendant's plea and thus permit other judges to serve as facilitators for reaching a plea agreement between the government and the defendant. **[Cite?]** The Committee decided to leave the Rule as it is with the understanding that doing so was in no way intended to make any change in the existing law interpreting that provision.

Rule 11(c)(2) retains the current requirement that the parties must ordinarily disclose in open court the existence of a plea agreement. The provision was added in 1974 and was apparently designed to avoid the dangers of sub rosa or secret agreements between the parties at a time when plea bargaining was just emerging from its status as a questionable practice and agreements between the government and the defendant were often covert. *See* Advisory Committee Note to 1974 Amendments to Rule 11, *citing* People v. West, 477 P.2d 409, 417 (Cal. 1970) (discussing need for public disclosure of agreements and citing ABA Standards). As the court noted in *West*, the "result of such concealment is that the ordinary trial record will not reveal an unkept plea bargain or a plea induced by coercion or improper promises." 477 P.2d at 417, n. 12 (citing authorities). The Committee considered eliminating or modifying the need for public disclosure because of concerns that doing so might jeopardize on-going investigations where a cooperating defendant has entered into an agreement with the Government to assist in those investigations. Although the rule allows an exception to public disclosure for "good cause," the rule does not specify what constitutes good cause or who decides whether it exists. The exception was

apparently added by the House Committee on the Judiciary. *See* Notes of Committee on the Judiciary, House Report No. 94-247. Those notes note indicate that the issue should be resolved by the courts on a case by case basis. Although those notes do not reflect that Congress discussed the issue of jeopardizing on-going investigations, the notes do reflect that Congress believed that the change would "permit a fair trial when there is substantial media interest in a case and the court is rejecting a plea agreement." *Id.* Nor is it clear what the sanction might be for failing to make public disclosure. Nonetheless, the Committee determined to retain the current rule, with the good cause exception.

Amended Rule 11(c)(3) to (5) addresses the topics of consideration, acceptance, and rejection of a plea agreement. They are discussed separately because in the past there has been some question about the possible interplay between the court's consideration of the guilty plea in conjunction with a plea agreement and sentencing and the ability of the defendant to withdraw his or her plea. *See United States v. Hyde*, 520 U.S. 670 (1997) (holding that plea and plea agreement need not be accepted or rejected as a single unit; "guilty pleas can be accepted while plea agreements are deferred, and the acceptance of the two can be separated in time."). The amendments are not intended to make any change in practice. Similarly, the Committee decided to more clearly spell out in Rule 11(d) and 11(e) the ability of defendant to withdraw his or her plea. *See United States v. Hyde, supra.*

Finally, Rule 11(e) is a new provision that addresses the finality of a guilty or no contest plea after the court imposes sentence. That matter is currently addressed in Rule 32 and is intended to make it clear that the ability of a defendant to withdraw a plea after sentence is imposed is not possible.

Rule 12. Pleadings and Motions Before Trial; Defenses and Objections.	Rule 12. Pretrial Motions
(a) Pleadings and Motions. Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and nolo contendere. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.	**(a) Pleadings and Motions. [Except as provided in Rule 58 — Judges Miller and Roll to do further study — pleadings may involve other things]** Pleadings and pleas in criminal proceedings are the indictment and the information, and the pleas of not guilty, guilty, and no contest. All other pleas, demurrers, and motions to quash the indictment are abolished.

(b) Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial: **(1)** Defenses and objections based on defects in the institution of the prosecution; or **(2)** Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or **(3)** Motions to suppress evidence; or **(4)** Requests for discovery under Rule 16; or **(5)** Requests for a severance of charges or defendants under Rule 14.	**(b) Pretrial Motions.** **(1)** ***In General.*** The parties may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue. At the court's discretion, a motion may be written or oral. The following must be raised before trial: (A) a motion alleging a defect in the institution of the prosecution; (B) a motion alleging a defect in the indictment or information — but at any time during the proceeding, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense; (C) a motion to suppress evidence; (D) a Rule 14 motion to sever charges or defendants; and (E) a Rule 16 motion for discovery. **(2)** ***Notice of the Government's Intent to Use Evidence.***[9] (A) ***At the Discretion of the Government.*** At the arraignment or as soon afterward as practicable, the government may give notice to the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under Rule 12(b)(1). (B) ***At the Request of the Defendant.*** At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(1), request notice of the government's intent to use (in its evidence in chief at trial)

[9] The revised language based on this rule was moved to new 12(b)(2). The later sections have been relettered accordingly.

(c) Motion Date. Unless otherwise provided by local rule, the court may, at the time of the arraignment or as soon thereafter as practicable, set a time for the making of pretrial motions or requests and, if required, a later date of hearing.	**(c) Motion Deadline.** The court may at the arraignment, or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing.
(d) Notice by the Government of the Intention to Use Evidence.[10] **(1) At the Discretion of the Government.** At the arraignment or as soon thereafter as is practicable, the government may give notice to the defendant of its intention to use specified evidence at trial in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under subdivision (b)(3) of this rule. **(2) At the Request of the Defendant.** At the arraignment or as soon thereafter as is practicable the defendant may, in order to afford an opportunity to move to suppress evidence under subdivision (b)(3) of this rule, request notice of the government's intention to use (in its evidence in chief at trial) any evidence which the defendant may be entitled to discover under Rule 16 subject to any relevant limitations prescribed in Rule 16.	
(e) Ruling on Motion. A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.	**(d) Ruling on a Motion.** The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.
(f) Effect of Failure To Raise Defenses or Objections. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.	**(e) Waiver of a Defense, Objection, or Request.** A party waives any Rule 12(b)(1) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver.

[10] The revised language based on this rule was moved to new 12(b)(2). The later sections have been relettered accordingly.

(g) Records. A verbatim record shall be made of all proceedings at the hearing, including such findings of fact and conclusions of law as are made orally.	**(f) Records.** All proceedings at a motion hearing, including any findings of fact and conclusions of law made by the court, must be recorded verbatim by a court reporter or by a suitable recording device.
(h) Effect of Determination. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be continued in custody or that bail be continued for a specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect the provisions of any Act of Congress relating to periods of limitations.	**(g) Defendant's Continued Custody or Release Status.**[11] If the court grants a motion to dismiss based on a defect in the institution of the prosecution, in the indictment, or in the information, it may continue bail or custody for a specified time until a new indictment or information is filed. This rule does not affect any federal statutory period of limitations.
(i) Production of Statements at Suppression Hearing. Rule 26.2 applies at a hearing on a motion to suppress evidence under subdivision (b)(3) of this rule. For purposes of this subdivision, a law enforcement officer is deemed a government witness.	**(h) Producing Statements at a Suppression Hearing.** Rule 26.2 applies at a suppression hearing under Rule 12(b)(1)(C). In a suppression hearing, a law enforcement officer is considered a government witness. **[Schlueter to review other similar provisions for consistency.]**

[11] The SSC thinks that the Advisory Committee should consider moving this subdivision into Rule 46.

COMMITTEE NOTE

Rule 12 has been amended to make the rule more easily understood. The Committee has also changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only. Several substantive changes have been made, however.

The last sentence of current Rule 12(a), referring to the abolishment of "all other pleas, and demurrers and motions to quash" has been deleted as being unnecessary.

Rule 12(b)(2) is composed of what is currently Rule 12(d). The Committee believed that that material, which addresses the requirement of government disclosure for the purpose of facilitating timely defense objections and motions, was more appropriately associated with the pretrial motions specified in Rule 12(b)(1).

In Rule 12(c), the reference to the "local rule" exception has been deleted to make it clear that judges should be encouraged to set deadlines for motions. The Committee believed that doing so promotes more efficient case management, especially where there is a heavy docket of pending cases. Although the rule permits some discretion in whether to set a date for motion hearings, the Committee believed that doing so at an early point in the proceedings would also promote judicial economy.

Moving the language in current Rule 12(d) caused the relettering of the sections following Rule 12(c).

Although amended Rule 12(e) is a revised version of current Rule 12(f), the Committee intends to make no change in the current law regarding waivers of motions or defenses.

Rule 12.1. Notice of Alibi	Rule 12.1. Notice of Alibi Defense[12]
(a) Notice by Defendant. Upon written demand of the attorney for the government stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten days, or such different time as the court may direct, upon the attorney for the government a written notice of the defendant's intention to offer a defense of alibi. Such notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defendant intends to rely to establish such alibi.	**(a) Government Request for Notice and Defendant's Response.** **(1)** ***Government's Request.*** The government attorney may request in writing that the defendant notify the government attorney of any intended alibi defense. The request must state the time, date, and place of the alleged offense. **(2)** ***Defendant's Response.*** Within 10 days after the request, or some other time the court directs, the defendant must serve written notice on the government attorney of any intended alibi defense. The defendant's notice must state the specific places where the defendant claims to have been at the time of the alleged offense and the names, addresses, and telephone numbers of the alibi witnesses on whom the defendant intends to rely.

[12] The SSC suggests that the Advisory Committee consider making the notice requirements in 12.1, 12.2, and 12.3 more uniform. Rule 12.1(a)(2) and (b)(2) require ten days' notice. Rule 12.2(a) and (b) require notice "within the time provided for the filing a pretrial motion." Rule 12.3(a)(1) requires notice "within the time provided for filing a pretrial motion"; Rule 12.3(a)(3) requires a government response within ten days of the defendant's notice; and Rule 12.3(a)(4)(B) and (C) require action within seven days of the government's demand or defendant's response. Also, the SSC recommends that the Advisory Committee adopt a deadline for when the government's attorney should present the written demand that the defendant give notice of any intended alibi defense. A logical deadline would be "within the time provided for filing a pretrial motion" — this language appears in Rule 12.2(a) and (b) and in Rule 12.3(a(1). The SSC carefully considered the suggestion to combine Rules 12.1, 12.2, and 12.3, but after several drafting attempts, the SSC abandoned the effort as impracticable.

(b) Disclosure of Information and Witness. Within ten days thereafter, but in no event less than ten days before trial, unless the court otherwise directs, the attorney for the government shall serve upon the defendant or the defendant's attorney a written notice stating the names and addresses of the witnesses upon whom the government intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied upon to rebut testimony of any of the defendant's alibi witnesses.	**(b) Disclosure of Government Witnesses.** **(1)** ***Disclosure.*** If the defendant serves a Rule 12.1(a)(2) notice, the government attorney must disclose in writing to the defendant, or the defendant's attorney, the names, addresses, and telephone numbers of the witnesses the government intends to rely on to establish the defendant's presence at the scene of the alleged offense, and any government rebuttal witnesses to the defendant's alibi witnesses. **(2)** ***Time to Disclose.*** Unless the court directs otherwise, the government attorney must give notice under Rule 12.1(b)(1) within 10 days after the defendant serves notice of an intended alibi defense under Rule 12.1(a)(2), but no later than 10 days before trial.
(c) Continuing Duty to Disclose. If prior to or during trial, a party learns of an additional witness whose identity, if known, should have been included in the information furnished under subdivision (a) or (b), the party shall promptly notify the other party or the other party's attorney of the existence and identity of such additional witness.	**(c) Continuing Duty to Disclose.** Both the government attorney and the defendant must promptly disclose in writing[13] to the other party the name, address, and telephone numbers of any additional witness if: (1) the disclosing party learns of the witness before or during trial; and (2) the witness should have been disclosed under Rule 12.1(a) or (b) if the disclosing party had earlier known it. **[Schlueter to restyle current rule.]**
(d) Failure to Comply. Upon failure of either party to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at, the scene of the alleged offense. This rule shall not limit the right of the defendant to testify.	**(d) Exceptions.** For good cause the court may grant an exception to any requirement of Rule 12.1 (a) - (c).

[13] *In writing* was added here to be consistent with 12.3(b).

(e) Exceptions. For good cause shown, the court may grant an exception to any of the requirements of subdivisions (a) through (d) of this rule.	**(e) Failure to Comply.** If a party fails to comply with this rule, the court may exclude the testimony of any undisclosed witness regarding the defendant's alibi. This rule does not limit the defendant's right to testify.
(f) Inadmissibility of Withdrawn Alibi. Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connections with such intention, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.	**(f) Inadmissibility of Withdrawn Intent.** Evidence of an intent to rely upon an alibi defense, later withdrawn, or of statements made in connection with that intent, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intent.

COMMITTEE NOTE

Rule 12.1 has been amended to make the rule more easily understood. The Committee has also changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only. Several substantive changes have been made, however.

Current Rule 12(d) and 12(e) have been switched in the amended rule to improve the organization of the rule.

Finally, the amended rule includes a requirement that in providing the names and addresses of alibi and any rebuttal witnesses, the parties must also provide the phone numbers of those witnesses. *See* Rule 12(a)(2), Rule 12(b)(1), and Rule 12(c) The Committee believed that requiring such information would facilitate location of, and interviews with, those witnesses.

Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition[14]	Rule 12.2. Notice of Insanity Defense; Mental Examination[15]
(a) Defense of Insanity. If a defendant intends to rely upon the defense of insanity at the time of the alleged offense, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.	**(a) Notice of an Insanity Defense.** A defendant who intends to rely on a defense of insanity at the time of the alleged offense must notify the government's attorney in writing within the time provided for filing a pretrial motion, or at any later time the court directs. A defendant who fails to comply with the requirements of this subdivision cannot rely on an insanity defense. The court may — for good cause — allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.
(b) Expert Testimony of Defendant's Mental Condition. If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of guilt, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.	**(b) Notice of Expert Testimony of a Mental Condition.** If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing on either the issue of guilt or the issue of punishment in a capital case, the defendant must — within the time provided for the filing of pretrial motions or at a later time as the court directs — notify the attorney for the government in writing of this intention and file a copy of the notice with the clerk. The court may, for good cause, allow late filing of the notice or grant additional time to the parties to prepare for trial or make any other appropriate order.

[14] Matter underlined and struck out reflects proposed amendments being considered by full advisory committee, subject to edit by SSC.

[15] The SSC suggests that the Advisory Committee consider making the notice requirements in 12.1, 12.2, and 12.3 more uniform. See fn. 104.

(c) Mental Examination of Defendant. In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to an examination pursuant to 18 U.S.C. 4241 or 4242. No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony.	**(c) Mental Examination.** (1) ***Authority to Order Examination; Procedures.*** If the defendant provides notice under Rule 12.2(a), the court must, upon the government's motion, order the defendant to submit to an examination conducted under 18 U.S.C. § 4242. If the defendant provides notice under Rule 12.2(b) the court may, upon the government's motion, order the defendant to submit to an examination conducted under procedures ordered by the court. (2) ***Disclosure of Results of Examination.*** The results of an examination conducted solely under Rule 12.2(b)(2) must be sealed and must not be disclosed to any attorney for the government or the defendant unless the defendant is found guilty of one or more capital crimes and the defendant confirms his or her intent to offer mental-condition evidence during sentencing proceedings. The results of the examination may be disclosed earlier to the defendant for good cause, but then similar disclosure must be made to the attorney for the government. (3) ***Disclosure of the Defendant's Statements.*** No statement made by the defendant in the course of any examination provided for by this rule (whether the examination is with or without the consent of the defendant), no testimony by the expert based on the statement, and no other fruits of the statement may be admitted into evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony.

(d) Failure to Comply. If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's guilt.	**(d) Failure to Comply.** If the defendant fails to give notice under Rule 12.2(b) or does not submit to an examination when ordered under Rule 12.2(c), the court may exclude the testimony of the defendant's expert witness on the issue of the defendant's mental disease, mental defect, or any other mental condition bearing on the defendant's guilt **[or punishment in a capital case]. (Subject to new amendment)**
(e) Inadmissibility of Withdrawn Intention. Evidence of an intention as to which notice was given under subdivision (a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.	**(e) Inadmissibility of Withdrawn Intention.** Evidence of an intention as to which notice was given under Rule 12.2(a) or (b), later withdrawn, is not admissible in any civil or criminal proceeding against the person who gave notice of the intention.

COMMITTEE NOTE

Rule 12.2 has been amended to make the rule more easily understood. The Committee has also changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only. Several substantive changes have been made, however.

[Further discussion of style amendments to rule have been deferred pending decisions on substantive changes]

Rule 12.3. Notice of Defense Based upon Public Authority	Rule 12.3. Notice of Public-Authority Defense[16]
(a) Notice by Defendant; Government Response; Disclosure of Witnesses. **(1) Defendant's Notice and Government's Response.** A defendant intending to claim a defense of actual or believed exercise of public authority on behalf of a law enforcement or Federal intelligence agency at the time of the alleged offense shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, serve upon the attorney for the Government a written notice of such intention and file a copy of such notice with the clerk. Such notice shall identify the law enforcement or Federal intelligence agency and any member of such agency on behalf of which and the period of time in which the defendant claims the actual or believed exercise of public authority occurred. If the notice identifies a Federal intelligence agency, the copy filed with the clerk shall be under seal. Within ten days after receiving the defendant's notice, but in no event less than twenty days before the trial, the attorney for the Government shall serve upon the defendant or the defendant's attorney a written response which shall admit or deny that the defendant exercised the public authority identified in the defendant's notice.	**(a) Notice of Defense and Disclosure of Witnesses.** **(1)** ***Notice in General.*** A defendant who intends to assert a defense of **[actual or believed]** exercise of public authority on behalf of a law-enforcement agency or federal intelligence agency at the time of the alleged offense must so notify the government attorney in writing within the time provided for filing a pretrial motion, or at any later time the court directs. The notice filed with the clerk must be under seal if the notice identifies a federal intelligence agency under whose authority the defendant claims to have acted. **(2)** ***Contents.*** The notice must contain the following information: (A) the law-enforcement agency or federal intelligence agency involved; (B) the agency member on whose behalf the defendant claims to have acted; and (C) the time during which the defendant claims to have acted with public authority. **(3)** ***Response to Notice.*** The government attorney must serve a written response on the defendant or the defendant's attorney within 10 days after receiving the defendant's notice, but no later than 20 days before trial. The response must admit or deny that the defendant exercised the public authority identified in the defendant's notice.

[16] The SSC suggests that the Advisory Committee consider making the notice requirements in 12.1, 12.2, and 12.3 more uniform. See fn. 104.

(2) Disclosure of Witnesses. At the time that the Government serves its response to the notice or thereafter, but in no event less than twenty days before trial, the attorney for the Government may serve upon the defendant or the defendant's attorney a written demand for the names and addresses of the witnesses, if any, upon whom the defendant intends to rely in establishing the defense identified in the notice. Within seven days after receiving the Government's demand, the defendant shall serve upon the attorney for the Government a written statement of the names and addresses of any such witnesses. Within seven days after receiving the defendant's written statement, the attorney for the Government shall serve upon the defendant or the defendant's attorney a written statement of the names and addresses of the witnesses, if any, upon whom the Government intends to rely in opposing the defense identified in the notice.	**(4)** ***Disclosing Witnesses.*** (A) *Government's Request.* The government attorney may request in writing that the defendant disclose the names and addresses of any witnesses the defendant intends to rely on to establish a public-authority defense. The government's attorney may serve the request when the government serves its response to the defendant's notice under Rule 12.3(a)(1), or later, but must serve the notice no later than 20 days before trial. (B) *Defendant's Response.* Within 7 days after receiving the government's request, the defendant must serve on the government attorney a written statement of the names and addresses of the witnesses. (C) *Government's Reply.* Within 7 days after receiving the defendant's statement, the government attorney must serve on the defendant or the defendant's attorney a written statement of the names and addresses of any witnesses the government intends to rely on to oppose the defendant's public-authority defense.
(3) Additional Time. If good cause is shown, the court may allow a party additional time to comply with any obligation imposed by this rule.	**(5)** ***Additional Time.*** The court may for good cause allow a party additional time to comply with this rule.
(b) Continuing Duty to Disclose. If, prior to or during trial, a party learns of any additional witness whose identity, if known, should have been included in the written statement furnished under subdivision (a)(2) of this rule, that party shall promptly notify in writing the other party or the other party's attorney of the name and address of any such witness.	**(b) Continuing Duty to Disclose.** Both the government attorney and the defendant or the defendant's attorney must promptly disclose in writing to the other party the name and address of any additional witness if: **(1)** the disclosing party learns of the witness before or during trial; and **(2)** the witness's identity should have been disclosed under Rule 12.3(a)(2) if the disclosing party had earlier known it.

(c) Failure to Comply. If a party fails to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered in support of or in opposition to the defense, or enter such other order as it deems just under the circumstances.[17] This rule shall not limit the right of the defendant to testify.	**(c) Failure to Comply.** If a party fails to comply with this rule, the court may exclude the testimony of any undisclosed witness regarding the public-authority defense. This rule does not limit the defendant's right to testify.
(d) Protective Procedures Unaffected. This rule shall be in addition to and shall not supersede the authority of the court to issue appropriate protective orders, or the authority of the court to order that any pleading be filed under seal.	**(d) Protective Procedures Unaffected.** This rule does not limit the court's authority to issue appropriate protective orders or to order that any pleading be sealed.
(e) Inadmissibility of Withdrawn Defense Based upon Public Authority. Evidence of an intention as to which notice was given under subdivision (a), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.	**(e) Inadmissibility of Withdrawn Defense Based upon Public Authority.** Evidence of an intention as to which notice was given under Rule 12.3(a), later withdrawn, is not admissible in any civil or criminal proceeding against the person who gave notice of the intention.

[17] The SSC deleted the following language "or enter such other order as it deems just under the circumstances" from the restyled version because it seems unnecessary, and because deleting it makes this subdivision consistent with the parallel provisions in Rules 12.1(d) and 12.2(d).

COMMITTEE NOTE

Rule 12.3 has been amended to make the rule more easily understood. The Committee has also changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only. Several substantive changes have been made, however.

The Committee considered the issue of whether (as currently provided in Rule 12.3) a defendant could invoke the defense of public authority on either an actual or believed exercise of public authority. The Committee ultimately decided that the any attempt to provide the defendant with a "right" to assert the defense was not a matter not within the purview of the Committee under the Rules Enabling Act. The Committee decided to retain the current language which recognizes, as a nonsubstantive matter, that if the defendant intends to raise the defense, notice must be given. Thus, the Committee decided not to make any changes in the current rule regarding the availability of the defense.

As in Rule 12.1, the Committee decided to include in the restyled rule the requirement that the parties provide the telephone numbers of any witnesses disclosed under the rule. *See* Rule 12.3(a)(4) and 12.3(b).

Rule 13. Trial Together of Indictments or Informations	Rule 13. Joint Trial of Separate Cases
The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.	The court may order that separate cases be tried together as though brought in a single indictment or information if all offenses and all defendants could have been joined in a single indictment or information.

COMMITTEE NOTE

Rule 13 has been amended to make the rule more easily understood. The Committee has also changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only.

Rule 14. Relief from Prejudicial Joinder	Rule 14. Relief from Prejudicial Joinder
If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or[18] separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions[19] made by the defendants which the government intends to introduce in evidence at the trial.	**(a) Relief.** If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice the defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires. **(b) Defendants' Statements.** Before ruling on a defendant's motion to sever, the court may order the government attorney to deliver to the court for in camera inspection any of the defendants' statements that the government intends to use as evidence.

[18] Professor Saltzburg says deletion of *an election or* is OK.

[19] Professor Saltzburg says deletion of *or confessions* is OK; the phrase is included in the word *statements*.

COMMITTEE NOTE

Rule 14 has been amended to make the rule more easily understood. The Committee has also changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only.

The reference to a defendant's "confession" in the last sentence of the current rule has been deleted. The Committee believed that the reference to the "defendant's statements" in the amended rule would fairly embrace any confessions or admissions by a defendant.

Rule 15. Depositions	Rule 15. Depositions
(a) When Taken. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place. If a witness is detained pursuant to section 3144 of title 18, United States Code, the court on written motion of the witness and upon notice to the parties may direct that the witness' deposition be taken. After the deposition has been subscribed the court may discharge the witness.	**(a) When Taken.** **(1)** ***In General.*** A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant such motion due to exceptional circumstances in the case and in the interest of justice. If the court orders the deposition to be taken, it may also require the deponent to produce at the deposition any designated book, paper, document, record, recording, data, or other material not privileged. **(2)** ***Detained Material Witness.*** A witness who is detained under 18 U.S.C. § 3144 may request to be deposed by filing a written motion and giving notice to the parties. The court may then order that the deposition be taken and may discharge the witness after the witness has signed under oath the deposition transcript.

(b) Notice of Taking. The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time or change the place for taking the deposition. The officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce the defendant at the examination and keep the defendant in the presence of the witness during the examination, unless, after being warned by the court that disruptive conduct will cause the defendant's removal from the place of the taking of the deposition, the defendant persists in conduct which is such as to justify exclusion from that place. A defendant not in custody shall have the right to be present at the examination upon request subject to such terms as may be fixed by the court, but a failure, absent good cause shown, to appear after notice and tender of expenses in accordance with subdivision (c) of this rule shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.	**(b) Notice.** **(1)** ***In General.*** A party seeking to take a deposition must give every other party reasonable written notice of the deposition's date and location. The notice must state the name and address of each deponent. If requested by a party receiving the notice, the court for good cause may change the deposition's date or location. **(2)** ***To the Custodial Officer.*** The party seeking to take the deposition must also notify the officer who has custody of the defendant of the scheduled date and location.

	(c) Defendant's Presence.[20] **(1)** ***Defendant in Custody.*** The officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant: (A) waives in writing the right to be present; or (B) persists in disruptive conduct justifying exclusion after the court has warned the defendant that disruptive conduct will result in the defendant's exclusion. **(2)** ***Defendant Not in Custody.*** A defendant who is not in custody has the right upon request to be present at the deposition, subject to any conditions imposed by the court. If the government tenders the defendant's expenses as provided in Rule 15(d) but the defendant still fails to appear, the defendant — absent good cause — waives both the right to appear and any objection to the taking and use of the deposition based upon that right.
(c) Payment of Expenses. Whenever a deposition is taken at the instance of the government, or whenever a deposition is taken at the instance of a defendant who is unable to bear the expenses of the taking of the deposition, the court may direct that the expense of travel and subsistence of the defendant and the defendant's attorney for attendance at the examination and the cost of the transcript of the deposition shall be paid by the government.	**(d) Expenses.** If the deposition was requested by the government the court may — or if the defendant is unable to bear the deposition expenses the court must — order the government to pay: **(1)** the travel and subsistence expenses of the defendant and the defendant's attorney to attend the deposition, and **(2)** the deposition transcript costs.

[20] Rule 15(b) involves notice. The subject of a defendant's right to be present should be the subject of a separate subdivision: Rule 15(c).

(d) How Taken. Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules, provided that (1) in no event shall a deposition be taken of a party defendant without that defendant's consent, and (2) the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself. The government shall make available to the defendant or the defendant's counsel for examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the government and to which the defendant would be entitled at the trial.	**(e) How Taken.** Unless these rules or a court order provides otherwise, a deposition must be filed, and it must be taken in the same manner as a deposition in a civil action, except that:**[check Civil Rule amendments to Rule 5]** **(1)** A defendant may not be deposed without that defendant's consent. **(2)** The scope and manner of the deposition examination and cross-examination must be the same as would be allowed during trial. **(3)** The government must provide to the defendant or the defendant's attorney, for use at the deposition, any statement of the deponent in the government's possession to which the defendant would be entitled at trial.
(e) Use. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with that witness' deposition. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require the offering of all of it which is relevant to the part offered and any party may offer other parts.	**(f) Use as Evidence** **(1)** ***Substantive and Impeachment Use.*** If admissible under the Federal Rules of Evidence, a party may use all or part of a deposition — (A) as substantive evidence at a trial or hearing if: (i) the witness is unavailable as defined in Federal Rule of Evidence 804(a); or (ii) the witness testifies inconsistently with the deposition at the trial or hearing; and (B) to impeach the deponent. **(2)** ***Parts of a Deposition.*** If a party introduces in evidence only a part of a deposition, an adverse party may require the introduction of other admissible parts that ought in fairness to be considered with the part introduced. Any party may offer other parts.

(f) Objections to Deposition Testimony. Objections to deposition testimony or evidence or parts thereof and the grounds for the objection shall be stated at the time of the taking of the deposition.	**(g) Objections.** A party objecting to deposition testimony or evidence must state the grounds for the objection during the deposition.
(g) Deposition by Agreement Not Precluded. Nothing in this rule shall preclude the taking of a deposition, orally or upon written questions, or the use of a deposition, by agreement of the parties with the consent of the court.	**(h) Agreed Depositions Permitted.** The parties may by agreement take and use a deposition with the court's consent.

COMMITTEE NOTE

Rule 15 has been amended to make the rule more easily understood. The Committee has also changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only. Several substantive changes have been made, however.

In Rule 15(a), the list of materials to be produced has been amended to include the expansive term "data" to reflect the fact that in an increasingly technological culture, the information may exist in a format not already covered by the more conventional list, such as a book or document.

The last portion of current Rule 15(b), dealing with the defendant's presence at a deposition, has been moved to amended Rule 15(c).

Rule 15(d), which addresses the payment of expenses incurred by the defendant and the defendant's attorney, has been changed. The Committee discussed the issue of payment of expenses raised in restyled Rule 15(d). Under the current rule, if the government requests the deposition, or if the defendant requests the deposition and is unable to pay for it, the court *may* direct the government to pay for travel and subsistence for both the defendant and his or her attorney. In either case, the current rule requires the government to pay for the transcript. Under the amended rule, if the deposition was requested by the government, the court *must* require the government to pay subsistence and travel expenses and the cost of the deposition transcript. If the defendant is unable to pay the deposition expenses, the court *must* order the government to pay subsistence, travel, and the deposition transcript costs—regardless of who requested the deposition.

Rule 15(f)(2) comport with the familiar rule of optional completeness in Federal Rule of Evidence 106. Under that rule, once a party introduces a portion of a piece of evidence, the opponent may require the proponent to introduce other parts of the evidence which ought in fairness be considered. In making this change, the Committee intended to make no substantive change and noted that the revision parallels similar language in Federal Rule of Civil Procedure 32(a)(4).

Rule 16. Discovery and Inspection	Rule 16. Discovery and Inspection
(a) Governmental Disclosure of Evidence. **(1) Information Subject to Disclosure.** **(A) Statement of Defendant.** Upon request of a defendant the government must disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. The government must also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial. Upon request of a defendant which is an organization such as a corporation, partnership, association, or labor union, the government must disclose to the defendant any of the foregoing statements made by a person who the government contends (1) was, at the time of making the statement, so situated as a director, officer, employee or agent as to have been able legally to bind the defendant in respect to the subject of the statement, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to that alleged conduct in which the person was involved.	**(a) Government's Disclosure.** **(1) *Disclosable Information.*** (A) ***Defendant's Oral Statement.*** The government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial. (B) ***Defendant's Written or Recorded Statement.*** At the defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following: (i) any relevant written or recorded statement by the defendant if: (a) the statement is within the government's possession, custody, or control; and (b) the government attorney knows — or through due diligence could know — that the statement exists; (ii) the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and (iii) the defendant's recorded testimony before a grand jury relating to the charged offense.

	(C) ***Organizational Defendant.*** At the defendant's request, if the defendant is an organization, the government must disclose to the defendant any statement described in Rule 16(a)(1)(A) and (B) if the government contends that the person making the statement:
	(i) was legally able to bind the defendant regarding the subject of the statement because of that person's position as the defendant's director, officer, employee, or agent; or (ii) was personally involved in the alleged conduct constituting the offense and was legally able to bind the defendant regarding that conduct because of that person's position as the defendant's director, officer, employee, or agent.
(B) Defendant's Prior Record. Upon request of the defendant, the government shall furnish to the defendant such copy of the defendant's prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.	(D) ***Defendant's Prior Record.*** Upon request, the government must furnish the defendant with a copy of the defendant's prior criminal record that is within the government's possession, custody, or control if the government's attorney knows — or through due diligence could know — that the record exists.
(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.	(E) ***Documents and Objects.*** At the defendant's request, the government must permit the defendant to inspect and copy, or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control, and: (i) the item is material to the preparation of the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant.

(D) Reports of Examinations and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.	(F) ***Reports of Examinations and Tests.*** Upon request, the government must permit a defendant to inspect and copy, or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if the item is within the government's possession, custody, or control: (i) the government's attorney knows — or through due diligence could know — that the item exists; and (ii) the item is material to the preparation of the defense or the government intends to use the item in its case-in-chief at trial.
(E) Expert Witnesses. At the defendant's request, the government shall disclose to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case in chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) of this rule and the defendant complies, the government shall, at the defendant's request, disclose to the defendant a written summary of testimony the government intends to use on the Rules 702, 703, or 705 as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subdivision shall describe the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications.	(G) ***Expert Testimony.*** Upon request, the government must give to the defendant a written summary of any testimony the government intends to use in its case-in-chief at trial under Federal Rules of Evidence 702, 703, or 705. The summary must describe the witness's opinions, the bases and reasons for these opinions, and the witness's qualifications.

(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), (D), and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case. Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500. [21]	(2) ***Nondisclosable Information.*** Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the government attorney or other government agent in connection with the case's investigation or prosecution, **[or the discovery or inspection of statements made by prospective government witnesses as provided in 18 U.S.C. § 3500.] [Martin and Schlueter to prepare a list.]**
(3) Grand Jury Transcripts. Except as provided in Rules 6, 12(i) and 26.2, and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.	(3) ***Grand Jury Transcripts.*** This rule does not apply to the discovery or inspection of a grand jury's recorded proceedings, except as provided in Rules 6, 12(h), 16(a)(1), and 26.2.
[(4) Failure to Call Witness.] (Deleted Dec. 12, 1975)	
(b) The Defendant's Disclosure of Evidence. **(1) Information Subject to Disclosure.** **(A) Documents and Tangible Objects.** If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.	**(b) Defendant's Disclosure.** (1) ***Disclosable Information.*** (A) ***Documents and Objects.*** If the defendant requests disclosure under Rule 16(a)(1)(E), then upon compliance and the government's request, the defendant must permit the government to inspect and copy, or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if: (i) the item is within the defendant's possession, custody, or control; and (ii) the defendant intends to use the item in the defendant's case-in-chief at trial.

[21] On Professor Saltzburg's recommendation, the SSC deleted this sentence from the restyled version.

(B) Reports of Examinations and Tests. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports related to that witness' testimony.	(B) ***Reports of Examinations and Tests.*** If the defendant requests disclosure under Rule 16(a)(1)(F), then upon compliance and the government's request, the defendant must permit the government to inspect and copy, or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if: (i) the item is within the defendant's possession, custody, or control; and (ii) the defendant intends to use the item in the defendant's case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony.[22]
(C) Expert Witnesses. Under the following circumstances, the defendant shall, at the government's request, disclose to the government a written summary of testimony that the defendant intends to use on the Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial: (i) if the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, or (ii) if the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition. This summary shall describe the witnesses' opinions, the bases and reasons for those opinions, and the witnesses' qualifications.	(C) ***Expert Testimony.*** If the defendant requests disclosure under Rule 16(a)(1)(G), then upon compliance and the government's request, the defendant must give the government a written summary of any testimony the defendant intends to use as evidence at trial under Federal Rules of Evidence 702, 703, or 705. The summary must describe the witness's opinions, the bases and reasons for these opinions, and the witness's qualifications.

[22] I'd favor combining (A) and (B). The wording of (B) is identical to (A) except for the heading and the last four lines. — JFS.

(2) Information Not Subject To Disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or the defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, the defendant's agents or attorneys.	**(2)** ***Nondisclosable Information.***[23] Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of: (A) reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; or (B) a statement made to the defendant, or the defendant's attorney or agent, by: (i) the defendant; (ii) a government or defense witness; or (iii) a prospective government or defense witness.
[(3) Failure to Call Witness.] (Deleted Dec. 12, 1975)	
(c) Continuing Duty to Disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, such party shall promptly notify the other party or that other party's attorney or the court of the existence of the additional evidence or material.	**(c) Continuing Duty to Disclose.** A party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other party or the court, if: (1) the evidence or material is subject to discovery or inspection under this rule; and (2) that party previously requested, or the court ordered, its production.

[23] The SSC recommends that Rule 16(b)(2) be shortened to the following: "Except for the things discoverable under Rule 16(b)(1), a defendant is not required to disclose any other information."

(d) Regulation of Discovery. **(1) Protective and Modifying Orders.** Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.	**(d) Regulating Discovery.** (1) ***Protective and Modifying Orders.*** At any time the court may for good cause deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal.
(2) Failure To Comply With a Request. If at any time during the course of proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.	(2) ***Failure to Comply.*** If a party fails to comply with Rule 16, the court may: (A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions; (B) grant a continuance; (C) prohibit that party from introducing the undisclosed evidence; or (D) enter any other order that is just under the circumstances.
(e) Alibi Witnesses. Discovery of alibi witnesses is governed by Rule 12.1.[24]	

[24] The SSC deleted this section because it's duplicative of Rule 12.1. Professor Saltzburg concurred.

COMMITTEE NOTE

Rule 16 has been reorganized and amended to make the rule more easily understood. The Committee has also changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only. Several substantive changes have been made, however.

Current Rule 16(a)(1)(A) is now located in Rule 16(a)(1)(A), (B) and (C). Current Rule 16(a)(1)(B), (C), (D) and (E) have been relettered.

Amended Rule 16(b)(1)(B) includes a changed that may be substantive in nature. Rule 16(a)(1)(E) and 16(a)(1)(F) require production of specified information if the government intends to "use" the information "in its case-in-chief at trial." The Committee believed that the language in Rule 16(b)(1)(B), which deals with defense disclosure of information to the government should track the similar language in Rule 16(a)(1). In Rule 16(b)(1)(B)(ii), the Committee changed the current provision which reads: "the defendant intends to *introduce* the item as evidence" to the "defendant intends to *use* the item as evidence..." The Committee recognized that this might constitute a substantive change in the rule but believed that it was a necessary conforming change with the provisions in 16(a)(1)(E) and (F), noted *supra*, regarding use of evidence by the government.

In amended Rule 16(d)(1), the last phrase in the subdivision —which refers to a possible appeal of the court's discovery order—has been deleted. In the Committee's view, no substantive change results from that deletion. The language is unnecessary because the court, regardless of whether there is an appeal, will have maintained the record.

Finally, current Rule 16(e), which addresses the topic of notice of alibi witnesses, has been deleted as being unnecessarily duplicative of Rule 12.1.

Rule 17. Subpoena	Rule 17. Subpoena
(a) For Attendance of Witnesses; Form; Issuance. A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed[25] to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. A subpoena shall be issued by a United States magistrate judge in a proceeding before that magistrate judge, but it need not be under the seal of the court.	**(a) Witness's Attendance.** A subpoena must state the court's name and the title of the proceeding, include the seal of the court, and command the witness to attend and testify at the time and place the subpoena specifies. The clerk must issue a blank subpoena — signed and sealed — to the party requesting it and that party must fill in the blanks before the subpoena is served.
(b) Defendants Unable to Pay. The court shall order at any time that a subpoena be issued for service on a named witness upon an ex parte application of a defendant upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense. If the court orders the subpoena to be issued, the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government.	**(b) Defendant Unable to Pay.** Upon a defendant's ex parte application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness's fees and the necessity of the witness's presence for an adequate defense. If the court orders a subpoena to be issued, the process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas.
(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive.[26] The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.	**(c) Producing Documents and Objects.** **(1)** A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them. **(2)** On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.

[25] Professor Saltzburg approved substituting *witness* for *each person to whom it is directed.*

[26] Professor Saltzburg approved deleting *or oppressive.*

(d) Service. A subpoena may be served by the marshal, by a deputy marshal or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named and by tendering to that person the fee for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof.	**(d) Service.** A marshal, deputy marshal, or any nonparty who is at least 18 years old, may serve a subpoena. The server must deliver a copy of the subpoena to the witness and must tender to the witness one day's witness-attendance fee and the legal mileage allowance. The server need not tender the attendance fee or mileage allowance when the United States, a federal officer, or a federal agency has requested the subpoena.
(e) Place of Service. **(1) In United States.** A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States. **(2) Abroad.** A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C., § 1783.	**(e) Place of Service.** **(1)** ***In the United States.*** A subpoena requiring a witness to attend a hearing or trial may be served at any place within the United States. **(2)** ***In a Foreign Country.*** If the witness is in a foreign country, 28 U.S.C. § 1783 governs the subpoena's service.
(f) For Taking Depositions; Place of Examination. **(1) Issuance.** An order to take a deposition authorizes the issuance by the clerk of the court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. **(2) Place.** The witness whose deposition is to be taken may be required by subpoena to attend at any place designated by the trial court, taking into account the convenience of the witness and the parties.	**(f) Deposition Subpoena.** **(1)** ***Issuance.*** A court order to take a deposition authorizes the clerk in the district where the deposition is to be taken to issue a subpoena for any witness named or described in the order. **(2)** ***Place.*** After considering the convenience of the witness and the parties, the court may order — and the subpoena may require — the witness to appear anywhere the court designates.
(g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a United States magistrate judge.	**(g) Contempt.** The court may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by a federal court in that district. **[to be further studied by Schlueter as to question regarding "court"]**
(h) Information Not Subject to Subpoena. Statements made by witnesses or prospective witnesses may not be subpoenaed from the government or the defendant under this rule, but shall be subject to production only in accordance with the provisions of Rule 26.2.	**(h) Information Not Subject to a Subpoena.** No party may subpoena a statement of a witness or of a prospective witness under this rule. Rule 26.2 governs the production of those statements.

COMMITTEE NOTE

Rule 17 has been amended to make the rule more easily understood. The Committee has also changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only. Several substantive changes have been made, however.

In Rule 17(c)(1) the word "data" has been added to the list of matters that may be subpoenaed. The Committee believed that inserting that term will reflect the fact that in an increasingly technological culture, the information may exist in a format not already covered by the more conventional list, such as a book or document.

[The Committee considered whether to amend Rule 17(g). That rule deals with the authority of the district court to find a witness in contempt for failing to disobey a subpoena issued either by that court or by a magistrate judge of that district. Two issues were considered. First, whether the rule should be changed to reflect the authority of a district court to find a witness in contempt for refusing to comply with a subpoena issued by any other federal court. Under Rule 42, a judge may find a person in criminal contempt for both indirect and direct conduct; if the act occurs in the presence of the judge, the judge may punish the person summarily. If, on the other hand, the conduct is not in the presence of the judge, Rule 42 requires disposition upon notice and a hearing. Although neither Rule 17 nor Rule 42 address the issue, a judge may also find a witness in civil contempt. *See, e.g., United States v. Crawford Enterprises*, 643 F. Supp. 370 (S.D. Tex. 1986), *affm'd in part and dism'd in part*, 826 F.2d 392 (5th Cir. 1987). Indeed, a court may conduct civil and criminal contempt proceedings together. *United States v. United Mine Workers*, 330 U.S. 258, 299 (1946). But for the limitation in Rule 17(g), a judge might find a person in both civil and criminal contempt for violating a subpoena issued by another court. There is no clear line of authority on the question of whether a court may find a person in contempt for violating another court's orders. Although a case might arise where the inherent authority of a federal court to protect broader judicial interests and integrity might justify a criminal or civil contempt finding, the cases indicate that the contempt power is a means for a court to vindicate its authority and the integrity of its proceedings. *In re Amalgamated Meat Cutters and Butcher Workmen of North America*, AFL-CIO Local 248, 402 F. Supp. 942 (E.D. Wis. 1975). This view is consistent with 18 U.S.C. § 401 which recognizes that the contempt powers extend only to misbehavior, disobedience, or resistance to the court's orders. *See also* Rule of Civil Procedure 45(e) (failure to obey a court's subpoena may be considered a "contempt of the court from which the subpoena was issued"). Thus, the substance of Rule 17(d) was retained.

Second, the Committee considered whether Rule 17(g) should be amended to extend to a magistrate judge the authority to find a witness in contempt. Although the responsibilities and duties of magistrate judges have been extended over the years, the language of 18 U.S.C. 401 grants the contempt power to a "court of the United States." The prevailing view in the courts is that that provision does not grant magistrate judges the authority to find a witness in contempt. *See, e.g., Bingham v. Ward*, 100 F.3d 653, 656 (9th Cir. 1996) (magistrate judges do not have contempt powers). *See also* 28 U.S.C. § 636(e) (actions amounting to contempt during proceedings before magistrate are to be referred to a judge of the district court). Committee decided to leave this question for Congress.]

Rule 17.1. Pretrial Conference	Rule 17.1. Pretrial Conference
At any time after the filing of the indictment or information[27] the court upon motion of any party or upon its own motion may order one or more conferences to consider such matters as will promote a fair and expeditious trial. At the conclusion of a conference the court shall prepare and file a memorandum of the matters agreed upon. No admissions made by the defendant or the defendant's attorney at the conference shall be used against the defendant unless the admissions are reduced to writing and signed by the defendant and the defendant's attorney. This rule shall not be invoked in the case of a defendant who is not represented by counsel.	On its own, or on a party's motion, the court may hold one or more pretrial conferences to promote a fair and expeditious trial. When a conference ends, the court must prepare and file a memorandum of any matters agreed to during the conference. The government may not use any statement[28] made during the conference by the defendant or the defendant's attorney unless it is in writing and signed by the defendant and the defendant's attorney.

[27] Professor Saltzburg approved deleting *at any time after the filing of the indictment or information.*

[28] Professor Saltzburg recommended this change from the word *admission.*

COMMITTEE NOTE

Rule 17.1 has been amended to make the rule more easily understood. The Committee has also changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only. Several substantive changes have been made, however.

Current Rule 17.1 prohibits the court from holding a pretrial conference where the defendant is not represented by counsel. In the amended version, that restriction has been removed by deleting the last sentence of the Rule. The Committee believed that leaving the limitation in place might unnecessarily restrict the defendant's constitutional right to self-representation. *See Faretta v. California*, 422 U.S. 806 (1975). In addition, the Committee believed that pretrial conferences might be particularly useful in those cases where the defendant is proceeding pro se.

V. VENUE	Title V. Venue
Rule 18. Place of Prosecution and Trial	**Rule 18. Place of Prosecution and Trial**
Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice.	Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district in which the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant and the witnesses, and the prompt administration of justice.

COMMITTEE NOTE

Rule 18 has been amended to make the rule more easily understood. The Committee has also changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only. Several substantive changes have been made, however.

Rule 19. Rescinded.	Rule 19. [Rescinded.]

Rule 20. Transfer From the District for Plea and Sentence	Rule 20. Transfer for Plea and Sentence
(a) Indictment or Information Pending. A defendant arrested, held, or present in a district other than that in which an indictment or information is pending against that defendant may state in writing a wish to plead guilty or nolo contendere, to waive trial in the district in which the indictment or information is pending, and to consent to disposition of the case in the district in which that defendant was arrested, held, or present, subject to the approval of the United States attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States attorneys, the clerk of the court in which the indictment or information is pending shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant is arrested, held, or present, and the prosecution shall continue in that district.	**(a) Consent to Transfer.** A prosecution may be transferred from the district where the indictment or information is pending, or from which a warrant on a complaint has been issued, to the district where the defendant is arrested, held, or present, if: (1) the defendant states in writing a wish to plead guilty or no contest and to waive trial in the district where the indictment, information, or complaint is pending, consents in writing to the court's disposing of the case in the transferee district, and files the statement in the transferee district; and (2) the United States attorneys in both districts approve the transfer in writing. **(b) Clerk's Duties.** After receiving the defendant's or juvenile's statement and the required approvals, the clerk where the indictment, information, or complaint is pending must send the file, or a certified copy, to the clerk in the transferee district. **(c) Effect of a Not Guilty Plea.** If the defendant pleads not guilty after the case has been transferred under Rule 20(a) or (b), the clerk must return the papers to the court where the prosecution began, and that court must restore the proceeding to its docket. The defendant's statement that the defendant wished to plead guilty or no contest is not, in any civil or criminal proceeding, admissible against the defendant.

(b) Indictment or Information Not Pending. A defendant arrested, held, or present, in a district other than the district in which a complaint is pending against that defendant may state in writing a wish to plead guilty or nolo contendere, to waive venue and trial in the district in which the warrant was issued, and to consent to disposition of the case in the district in which that defendant was arrested, held, or present, subject to the approval of the United States attorney for each district. Upon filing the written waiver of venue in the district in which the defendant is present, the prosecution may proceed as if venue were in such district.	
(c) Effect of Not Guilty Plea. If after the proceeding has been transferred pursuant to subdivision (a) or (b) of this rule the defendant pleads not guilty, the clerk shall return the papers to the court in which the prosecution was commenced, and the proceeding shall be restored to the docket of that court. The defendant's statement that the defendant wishes to plead guilty or nolo contendere shall not be used against that defendant.	

(d) Juveniles. A juvenile (as defined in 18 U.S.C. § 5031) who is arrested, held, or present in a district other than that in which the juvenile is alleged to have committed an act in violation of a law of the United States not punishable by death or life imprisonment may, after having been advised by counsel and with the approval of the court and the United States attorney for each district, consent to be proceeded against as a juvenile delinquent in the district in which the juvenile is arrested, held, or present. The consent shall be given in writing before the court but only after the court has apprised the juvenile of the juvenile's rights, including the right to be returned to the district in which the juvenile is alleged to have committed the act, and of the consequences of such consent.	**(d) Juveniles.** **(1)** ***Consent to Transfer.*** A juvenile may be proceeded against as a juvenile delinquent in the district where the juvenile is arrested, held, or present, if: (A) the individual is a juvenile as defined in 18 U.S.C. § 5031;[29] (B) the alleged offense that occurred in the other district is not punishable by death or life imprisonment; (C) an attorney has advised the juvenile; (D) the court has informed the individual of the juvenile's rights — including the right to be returned to the district where the offense allegedly occurred — and the consequences of waiving those rights; (E) the juvenile, after receiving the court's information about rights, consents in writing to be proceeded against in the transferee district, and files the consent in the transferee district; (F) the United States attorneys for both districts approve the transfer in writing; and (G) the transferee court enters an order approving the transfer. **(2)** ***Clerk's Duties.*** After receiving the juvenile's written consent and the required approvals, the clerk where the indictment or information or complaint is pending or where the alleged offense occurred must send the file, or a certified copy, to the clerk in the transferee district.[30]

[29] The SSC substituted *federal law* for the U.S. Code citation because "juvenile" may be defined under statutes other than 18 U.S.C. § 5031 if Congress enacts any of the pending bills relating to juvenile offenses.

[30] The SSC has added this paragraph on Professor Saltzburg's suggestion.

COMMITTEE NOTE

Rule 20 has been amended to make the rule more easily understood. The Committee has also changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only. Several substantive changes have been made, however.

Rule 21. Transfer From the District for Trial.	Rule 21. Transfer for Trial
(a) For Prejudice in the District. The court upon motion of the defendant shall transfer the proceeding as to that defendant to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.	**(a) For Prejudice.** Upon the defendant's motion, the court must transfer the proceeding as to that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.
(b) Transfer in Other Cases. For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to that defendant or any one or more of the counts thereof to another district.	**(b) For Convenience.** Upon the defendant's motion, the court may transfer the proceeding, or one or more counts, as to that defendant to another district for the convenience of the parties and witnesses and in the interest of justice.
(c) Proceedings on Transfer. When a transfer is ordered the clerk shall transmit to the clerk of the court to which the proceeding is transferred all papers in the proceeding or duplicates thereof and any bail taken, and the prosecution shall continue in that district.	**(c) Proceedings on Transfer.** When the court orders a transfer, the clerk must send to the transferee district the file or a certified copy of it, and any bail taken. The prosecution will then continue in the transferee district.
	(d) Time to File a Motion to Transfer. A motion to transfer may be made at or before arraignment or at any other time the court or these rules prescribe.[31]

[31] This paragraph is old Rule 22, which the SSC suggests abrogating as a separate rule and including here because it is a subpart of Rule 21 — transfer for trial.

COMMITTEE NOTE

Rule 21 has been amended to make the rule more easily understood. The Committee has also changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only. Several substantive changes have been made, however.

Amended Rule 21(d) consists of what was formerly Rule 22. The Committee believed that the substance of Rule 22, which addressed the issue of the timing of motions to transfer, was more appropriate for inclusion in Rule 21.

Rule 22. Time of Motion to Transfer	Rule 22. Time to File a Motion to Transfer[32]
A motion to transfer under these rules may be made at or before arraignment or at such other time as the court or these rules may prescribe.	[Transferred to Rule 21(d).]

COMMITTEE NOTE

Rule 22 has been abrogated. The substance of the rule is now located in Rule 21(d)

[32] This rule has now become Rule 21(d). See fn. 130.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO
333 LOMAS N.E., SUITE 760
ALBUQUERQUE, NEW MEXICO 87102

JAMES A. PARKER
JUDGE

August 16, 1999

BY FAX

TO: John K. Rabiej, Esq.
Joseph F. Spaniol, Jr., Esq.
Bryan A. Garner, Esq.

RE: ***Restyled Criminal Rules 11-22 – August 4, 1999 Draft***

On August 12, 1999 I sent to you by fax my proposed edits and comments regarding Rules 1-10 (and a few on Rule 11).

Attached are pages 36, 38, 40, 41, 42, 46, 47, 48, 50, 51, 53, 54, 55, 59, 60, 61, 62, 64, 65, 67 and 69 of the August 4, 1999 draft showing my comments, questions and proposed edits to Rules 11-22. (Note: On August 12, I faxed to you pages 36, 41 and 42, but I am sending them again so that you will have, together, a set of all of my suggestions regarding Rule 11).

Again, I ask that Joe and Bryan review these and advise John by August 18 of those with which they agree or disagree.

Sorry, but I did not have time to reach Rules 23-31.

Thanks,

(c) **Advice to Defendant.** Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following: (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, and the maximum possible penalty provided by law including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and (2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding, and, if necessary, one will be appointed to represent the defendant; and (3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and (4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and (5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement; and	**(b) Consideration and Acceptance of a Guilty or No Contest Plea.** (1) ***Advising and Questioning the Defendant.*** Before the court accepts a plea of guilty or no contest, the defendant must be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following: (A) any statement that the defendant gives under oath may be used against the defendant in a later prosecution for perjury or false statement. (B) the right to plead not guilty, or having already so pleaded, to persist in that plea; (D) the right to a jury trial; (E) the right to be represented by counsel — and if necessary have the court appoint counsel — at trial and at every other stage of the proceeding; (F) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses; (G) the defendant's waiver of these trial rights if the court accepts a plea of guilty or no contest; (H) the nature of ~~the~~ EACH charge to which the defendant is pleading;

NB: DEFENDANTS OFTEN PLEAD TO MULTIPLE CHARGES, SOME OF WHICH MAY BE FELONIES AND SOME OF WHICH MAY BE MISDEMEANORS. THE NATURE OF EACH CHARGE TO WHICH A DEFENDANT PLEADS SHOULD BE ADDRESSED.

(e) Plea Agreement Procedure. (1) **In General.** The attorney for the government and the attorney for the defendant — or the defendant when acting pro se — may agree that, upon the defendant's entering a plea of guilty or nolo contendere to a charged offense, or to a lesser or related offense, the attorney for the government will: (A) move to dismiss other charges; or (B) recommend, or agree not to oppose the defendant's request for a particular sentence or sentencing range, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Any such recommendation or request is not binding on the court; or (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Such a plea agreement is binding on the court once it is accepted by the court. The court shall not participate in any discussions between the parties concerning any such plea agreement.[89]	**(c) Plea Agreement Procedure.** (1) ***In General.*** The government attorney and the defendant's attorney, or the defendant when proceeding pro se, may discuss and agree to a plea. The court must not participate in these discussions. If the defendant pleads guilty or no contest to either the charged offense or a lesser or related offense, the plea agreement may specify that the government's attorney will: (A) not bring, or will move to dismiss, other charges; (B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable (with the understanding that the recommendation or request does not bind the court); or (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable (such a plea agreement binds the court once the court accepts it).
(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, upon a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.	(2) ***Disclosing a Plea Agreement.*** **(A) Except for good cause, the parties must inform the court of the existence of a plea agreement at the arraignment, or at some other time, prior to trial, as established by the court.** (Further study on whether to eliminate it.) (B) The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

WITH THE UNDERSTANDING THAT

[89]This new language is not yet a part of the rule. It has been approved by the Judicial Conference and will be acted on by the Supreme Court before May 1, 1999.

NB. (1) TO MAKE 11(e)(1)(C) LANGUAGE PARALLEL TO 11(e)(1)(B)
(2) TO IMPROVE GRAMMER

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.[90]	(d) ***Withdrawing a Guilty or No Contest Plea.*** A defendant may withdraw a plea of guilty or no contest as follows: (1) Before the court accepts a plea of guilty or a plea of no contest, for any, or no, reason. (2) After the court accepts a plea of guilty or no contest, but before it imposes sentence if: (A) the court rejects a plea agreement under Rule 11(c)(5); or (B) the defendant can show fair and just reasons for requesting the withdrawal. (e) ***Finality of Guilty or No Contest Plea.*** After the court imposes sentence the defendant may not withdraw a plea of guilty or no contest and the plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

SHOULD NOT BE ITALICS.

[90] This language in the left column has been incorporated into the new Rule 11(e)(2)(A).

(6) Inadmissibility of Pleas, Plea Discussions, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions: **(A)** a plea of guilty which was later withdrawn; **(B)** a plea of nolo contendere; **(C)** any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or **(D)** any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made in by the defendant under oath, on the record, and in the presence of counsel.	**(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements.** Except as otherwise provided in this subdivision, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions: (1) a plea of guilty which was later withdrawn; (2) a plea of no contest; (3) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or (4) any statement made in the course of plea discussions with an **[government attorney]** attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.
(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.	
(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.	**(g) Recording the Proceedings.** The proceedings during which the defendant enters a plea must be recorded verbatim by a court reporter or by a suitable recording device. If there is a guilty plea or a no contest plea, the record must include the inquiries and advice to the defendant required under Rule 11(c), (d), and (f).
(h) Harmless Error. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.	**(h) Harmless Error.** A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

I BELIEVE THIS REFERENCE SHOULD NOW BE TO RESTYLED RULE 11(b) AND (c).

PLEADINGS, PLEAS AND

Rule 12. Pleadings and Motions Before Trial; Defenses and Objections.	Rule 12. Pretrial Motions — PLEAS,
(a) Pleadings and Motions. Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and nolo contendere. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.	(a) Pleadings and ~~Motions~~ [Except as provided in Rule 58 — Judges Miller and Roll to do further study — pleadings may involve other things] Pleadings and pleas in criminal proceedings are the indictment and the information, and the pleas of not guilty, guilty, and no contest. All other pleas, demurrers, and motions to quash the indictment are abolished.

THE TITLE (HEADER) OF RULE 12 SHOULD BE CHANGED TO REFLECT ALL SUBJECTS COVERED BY RULE 12, NOT JUST "PRETRIAL MOTIONS" WHICH IS THE SUBJECT OF 12(b) AND ALSO THE HEADER OF 12(b).

(b) Disclosure of Information and Witness. Within ten days thereafter, but in no event less than ten days before trial, unless the court otherwise directs, the attorney for the government shall serve upon the defendant or the defendant's attorney a written notice stating the names and addresses of the witnesses upon whom the government intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied upon to rebut testimony of any of the defendant's alibi witnesses.	**(b) Disclosure of Government Witnesses.** **(1)** ***Disclosure.*** If the defendant serves a Rule 12.1(a)(2) notice, the government attorney must disclose in writing to the defendant, or the defendant's attorney, the names, addresses, and telephone numbers of the witnesses the government intends to rely on to establish the defendant's presence at the scene of the alleged offense, and any government rebuttal witnesses to the defendant's alibi witnesses. **(2)** ***Time to Disclose.*** Unless the court directs otherwise, the government attorney must give notice under Rule 12.1(b)(1) within 10 days after the defendant serves notice of an intended alibi defense under Rule 12.1(a)(2), but no later than 10 days before trial.
(c) Continuing Duty to Disclose. If prior to or during trial, a party learns of an additional witness whose identity, if known, should have been included in the information furnished under subdivision (a) or (b), the party shall promptly notify the other party or the other party's attorney of the existence and identity of such additional witness.	**(c) Continuing Duty to Disclose.** Both the government attorney and the defendant must promptly disclose in writing[95] to the other party the name, address, and telephone numbers of any additional witness if: (1) the disclosing party learns of the witness before or during trial; and (2) the witness should have been disclosed under Rule 12.1(a) or (b) if the disclosing party had earlier known ~~it~~ **[Schlueter to restyle current rule.]** OF THE WITNESS.
(d) Failure to Comply. Upon failure of either party to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at, the scene of the alleged offense. This rule shall not limit the right of the defendant to testify.	**(d) Exceptions.** For good cause the court may grant an exception to any requirement of Rule 12.1 (a) - (c).
(e) Exceptions. For good cause shown, the court may grant an exception to any of the requirements of subdivisions (a) through (d) of this rule.	**(e) Failure to Comply.** If a party fails to comply with this rule, the court may exclude the testimony of any undisclosed witness regarding the defendant's alibi. This rule does not limit the defendant's right to testify.

[95] *In writing* was added here to be consistent with 12.3(b).

SHOULD THIS BE "ON"?

(f) Inadmissibility of Withdrawn Alibi. Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connections with such intention, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.	**(f) Inadmissibility of Withdrawn Intent.** Evidence of an intent to rely upon an alibi defense, later withdrawn, or of statements made in connection with that intent, is not in any civil or criminal proceeding admissible against the person who gave notice of the intent.

MOVE "ADMISSIBLE" TO FOLLOW "NOT"

Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition[96]	**Rule 12.2. Notice of Insanity Defense; Mental Examination**[97]
(a) Defense of Insanity. If a defendant intends to rely upon the defense of insanity at the time of the alleged offense, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.	**(a) Notice of an Insanity Defense.** A defendant who intends to rely on a defense of insanity at the time of the alleged offense must notify the government's attorney in writing within the time provided for filing a pretrial motion, or at any later time the court directs. A defendant who fails to comply with the requirements of this subdivision cannot rely on an insanity defense. The court may — for good cause — allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.
(b) Expert Testimony of Defendant's Mental Condition. If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of guilt, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.	**(b) Notice of Expert Testimony of a Mental Condition.** If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing on either the issue of guilt or the issue of punishment in a capital case, the defendant must — within the time provided for the filing of pretrial motions or at a later time as the court directs — notify the attorney for the government in writing of this intention and file a copy of the notice with the clerk. The court may, for good cause, allow late filing of the notice or grant additional time to the parties to prepare for trial or make any other appropriate order.

TO MAKE LANGUAGE PARALLEL TO THAT OF R12.2(e) AND R12.3(e)

SHOULD THIS BE "GOVERNMENT ATTORNEY"?

[96] Matter underlined and struck out reflects proposed amendments being considered by full advisory committee, subject to edit by SSC.

[97] The SSC suggests that the Advisory Committee consider making the notice requirements in 12.1, 12.2, and 12.3 more uniform. See fn. 104.

(c) Mental Examination of Defendant. In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to an examination pursuant to 18 U.S.C. 4241 or 4242. No statement made by the defendant in the course of any examination for by this rule, whether the examination with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony.	**(c) Mental Examination.** (1) ***Authority to Order Examination; Procedures.*** If the defendant provides notice under Rule 12.2(a), the court must, upon the government's motion, order the defendant to submit to an examination conducted under 18 U.S.C. § 4242. If the defendant provides notice under Rule 12.2(b) the court may, upon the government's motion, order the defendant to submit to an examination conducted under procedures ordered by the court. (2) ***Disclosure of Results of Examination.*** The results of an examination conducted solely under Rule 12.2(b)(2) must be sealed and must not be disclosed to any attorney for the government or the defendant unless the defendant is found guilty of one or more capital crimes and the defendant confirms ~~his or her~~ intent to offer mental-condition evidence during sentencing proceedings. The results of the examination may be disclosed earlier to the defendant for good cause, but then similar disclosure must be made to the attorney for the government. (3) ***Disclosure of the Defendant's Statements.*** No statement made by the defendant in the course of any examination provided for by this rule (whether the examination is with or without the consent of the defendant), no testimony by the expert based on the statement, and no other fruits of the statement may be admitted into evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony.
(d) Failure to Comply. If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's guilt.	**(d) Failure to Comply.** If the defendant fails to give notice under Rule 12.2(b) or does not submit to an examination when ordered under Rule 12.2(c), the court may exclude the testimony of the defendant's expert witness on the issue of the defendant's mental disease, mental defect, or any other mental condition bearing on the defendant's guilt **[or punishment in a capital case].** **(Subject to new amendment)**

SHOULD THIS BE "GOVERNMENT ATTORNEY"

THE

Rule 12.3. Notice of defense based upon public authority	Rule 12.3. Notice of Public-Authority Defense[98]
(a) Notice by defendant; government response; disclosure of witnesses. **(1) Defendant's Notice and Government's Response.** A defendant intending to claim a defense of actual or believed exercise of public authority on behalf of a law enforcement or Federal intelligence agency at the time of the alleged offense shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, serve upon the attorney for the Government a written notice of such intention and file a copy of such notice with the clerk. Such notice shall identify the law enforcement or Federal intelligence agency and any member of such agency on behalf of which and the period of time in which the defendant claims the actual or believed exercise of public authority occurred. If the notice identifies a Federal intelligence agency, the copy filed with the clerk shall be under seal. Within ten days after receiving the defendant's notice, but in no event less than twenty days before the trial, the attorney for the Government shall serve upon the defendant or the defendant's attorney a written response which shall admit or deny that the defendant exercised the public authority identified in the defendant's notice.	**(a) Notice of Defense and Disclosure of Witnesses.** (1) *Notice in General.* A defendant who intends to assert a defense of **[actual or believed]** exercise of public authority on behalf of a law-enforcement agency or federal intelligence agency at the time of the alleged offense must so notify the government attorney in writing within the time provided for filing a pretrial motion, or at any later time the court directs. The notice filed with the clerk must be under seal if the notice identifies a federal intelligence agency under whose authority the defendant claims to have acted. (2) *Contents.* The notice must contain the following information: (A) the law-enforcement agency or federal intelligence agency involved; (B) the agency member on whose behalf the defendant claims to have acted; and (C) the time during which the defendant claims to have acted with public authority. (3) *Response to Notice.* The government attorney must serve a written response on the defendant or the defendant's attorney within 10 days after receiving the defendant's notice, but no later than 20 days before trial. The response must admit or deny that the defendant exercised the public authority identified in the defendant's notice.

OF NOTICE.

THE

MUST

NB OMISSION OF THIS LANGUAGE THAT IS IN CURRENT RULE 12.3(a)(1). SEEMS TO BE A SUBSTANTIVE CHANGE.

[98] The SSC suggests that the Advisory Committee consider making the notice requirements in 12.1, 12.2, and 12.3 more uniform. See fn. 104.

(2) Disclosure of Witnesses. At the time that the Government serves its response to the notice or thereafter, but in no event less than twenty days before trial, the attorney for the Government may serve upon the defendant or the defendant's attorney a written demand for the names and addresses of the witnesses, if any, upon whom the defendant intends to rely in establishing the defense identified in the notice. Within seven days after receiving the Government's demand, the defendant shall serve upon the attorney for the Government a written statement of the names and addresses of any such witnesses. Within seven days after receiving the defendant's written statement, the attorney for the Government shall serve upon the defendant or the defendant's attorney a written statement of the names and addresses of the witnesses, if any, upon whom the Government intends to rely in opposing the defense identified in the notice.	**(4)** ***Disclosing Witnesses.*** (A) *Government's Request.* The government attorney may request in writing that the defendant disclose the names and addresses of ~~any~~ witnesses the defendant intends to rely on to establish a public-authority defense. The government's attorney may serve the request when the government serves its response to the defendant's notice under Rule 12.3(a)(1), or later, but must serve the notice no later than 20 days before trial. (B) *Defendant's Response.* Within 7 days after receiving the government's request, the defendant must serve on the government attorney a written statement of the names and addresses of ~~the~~ witnesses. (C) *Government's Reply.* Within 7 days after receiving the defendant's statement, the government attorney must serve on the defendant or the defendant's attorney a written statement of the names and addresses of ~~any~~ witnesses the government intends to rely on to oppose the defendant's public-authority defense.
(3) Additional Time. If good cause is shown, the court may allow a party additional time to comply with any obligation imposed by this rule.	**(5)** ***Additional Time.*** The court may for good cause allow a party additional time to comply with this rule.
(b) Continuing duty to disclose. If, prior to or during trial, a party learns of any additional witness whose identity, if known, should have been included in the written statement furnished under subdivision (a)(2) of this rule, that party shall promptly notify in writing the other party or the other party's attorney of the name and address of any such witness.	**(b) Continuing Duty to Disclose.** Both the government attorney and the defendant or the defendant's attorney must promptly disclose in writing to the other party the name and address of any additional witness if: (1) the disclosing party learns of the witness before or during trial; and (2) the witness's ~~identity~~ should have been disclosed under Rule 12.3(a)(2) if the disclosing party had ~~earlier known it~~.

EACH

RULE 12.3(a)(3)

SHOULD THIS BE "REQUEST" ?

TO MAKE THIS LANGUAGE PARALLEL TO THAT OF RULE 12.1(c)(2)

OF THE WITNESS.

SHOULD THIS BE "(4)" ?

Rule 13. Trial Together of Indictments or Informations	Rule 13. Joint Trial of Separate Cases
The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.	The court may order that separate cases be tried together as though brought in a single indictment or information if all offenses and all defendants could have been joined in a single indictment or information.

Rule 14. Relief from Prejudicial Joinder	Rule 14. Relief from Prejudicial Joinder
If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or[100] separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions[101] made by the defendants which the government intends to introduce in evidence at the trial.	**(a) Relief.** If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice ~~the~~ defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires. **(b) Defendants' Statements.** Before ruling on a defendant's motion to sever, the court may order the government attorney to deliver to the court for in camera inspection any of the defendants' statements that the government intends to use as evidence.

[100] Professor Saltzburg says deletion of *an election or* is OK.

[101] Professor Saltzburg says deletion of *or confessions* is OK; the phrase is included in the word *statements*.

Rule 15. Depositions	Rule 15. Depositions
(a) When Taken. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book paper, document, record, recording, or other material not privileged, be produced at the same time and place. If a witness is detained pursuant to section 3144 of title 18, United States Code, the court on written motion of the witness and upon notice to the parties may direct the witness' deposition be taken. After the deposition has been subscribed the court may discharge the witness.	**(a) When Taken.** (1) ***In General.*** A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant such motion due to exceptional circumstances in the case and in the interest of justice. If the court orders the deposition to be taken, it may also require the deponent to produce at the deposition any designated book, paper, document, record, recording, data, or other material not privileged. (2) ***Detained Material Witness.*** A witness who is detained under 18 U.S.C. § 3144 may request to be deposed by filing a written motion and giving notice to the parties. The court may then order that the deposition be taken and may discharge the witness after the witness has signed under oath the deposition transcript.
(b) Notice of Taking. The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time or change the place for taking the deposition. The officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce the defendant at the examination and keep the defendant in the presence of the witness during the examination, unless, after being warned by the court that disruptive conduct will cause the defendant's removal from the place of the taking of the deposition, the defendant persists in conduct which is such as to justify exclusion from that place. A defendant not in custody shall have the right to be present at the examination upon request subject to such terms as may be fixed by the court, but a failure, absent good cause shown, to appear after notice and tender of expenses in accordance with subdivision (c) of this rule shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.	**(b) Notice.** (1) ***In General.*** A party seeking to take a deposition must give every other party reasonable written notice of the deposition's date and location. The notice must state the name and address of each deponent. If requested by a party receiving the notice, the court for good cause may change the deposition's date or location. (2) ***To the Custodial Officer.*** The party seeking to take the deposition must also notify the officer who has custody of the defendant of the scheduled date and location. SHOULD THESE BE THE SAME — EITHER "A" OR "THE"?

	(c) Defendant's Presence.[102] **(1)** ***Defendant in Custody.*** The officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant: (A) waives in writing the right to be present; or (B) persists in disruptive conduct justifying exclusion after the court has warned the defendant that disruptive conduct will result in the defendant's exclusion. **(2)** ***Defendant Not in Custody.*** A defendant who is not in custody has the right upon request to be present at the deposition, subject to any conditions imposed by the court. If the government tenders the defendant's expenses as provided in Rule 15(d) but the defendant still fails to appear, the defendant — absent good cause — waives both the right to appear and any objection to the taking and use of the deposition based upon that right.
(c) Payment of Expenses. Whenever a deposition is taken at the instance of the government, or whenever a deposition is taken at the instance of a defendant who is unable to bear the expenses of the taking of the deposition, the court may direct that the expense of travel and subsistence of the defendant and the defendant's attorney for attendance at the deposition and the cost of the transcript of the deposition shall be paid by the government.	**(d) Expenses.** If the deposition was requested by the government the court may — or if the defendant is unable to bear the deposition expenses the court must — order the government to pay: **(1)** the travel and subsistence expenses of the defendant and the defendant's attorney to attend the deposition, and **(2)** the deposition transcript costs.

THIS SEEMS TO CHANGE THE SUBSTANCE AND MEANING OF CURRENT RULE 15(c). WAS THAT INTENDED?

[102] Rule 15(b) involves notice. The subject of a defendant's right to be present should be the subject of a separate subdivision: Rule 15(c).

	(i) was legally able to bind the defendant regarding the subject of the statement because of that person's position as the defendant's director, officer, employee, or agent; or (ii) was personally involved in the alleged conduct constituting the offense and was legally able to bind the defendant regarding that conduct because of that person's position as the defendant's director, officer, employee, or agent.
(B) Defendant's Prior Record. Upon request of the defendant, the government shall furnish to the defendant such copy of the defendant's prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.	(D) ***Defendant's Prior Record.*** Upon request, the government must furnish the defendant with a copy of the defendant's prior criminal record that is within the government's possession, custody, or control if the government's attorney knows — or through due diligence could know — that the record exists.
(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.	(E) ***Documents and Objects.*** At the defendant's request, the government must permit the defendant to inspect and copy, or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control, and: (i) the item is material to the preparation of the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant.

DOCUMENTS ARE "OBJECTS" TOO

OTHER

I BELIEVE THE CRAC DECIDED TO USE "GOVERNMENT ATTORNEY" INSTEAD OF "GOVERNMENT'S ATTORNEY."

(D) Reports of Examinations and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.	(F) ***Reports of Examinations and Tests.*** Upon request, the government must permit a defendant to inspect and copy, or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if the item is within the government's possession, custody, or control; AND: (i) the government's attorney knows — or through due diligence could know — that the item exists; and (ii) the item is material to the preparation of the defense or the government intends to use the item in its case-in-chief at trial.
(E) Expert Witnesses. At the defendant's request, the government shall disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case in chief at trial. This summary must describe the witnesses' opinions, the bases and the reasons therefor, and the witnesses' qualifications.	(G) ***Expert Testimony.*** Upon request, the government must give to the defendant a written summary of any testimony the government intends to use in its case-in-chief at trial under Federal Rules of Evidence 702, 703, or 705. The summary must describe the witness's opinions, the bases and reasons for these opinions, and the witness's qualifications.
(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), (D), and (E) of subdivision (a)(1), this rule does not authorize the discovery or 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. Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500. [103]	(2) ***Nondisclosable Information.*** Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the government attorney or other government agent in connection with the case's investigation or prosecution, **[or the discovery or inspection of statements made by prospective government witnesses as provided in 18 U.S.C. § 3500.] [Martin and Schlueter to prepare a list.]**
(3) Grand Jury Transcripts. Except as provided in Rules 6, 12(i) and 26.2, and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.	(3) ***Grand Jury Transcripts.*** This rule does not apply to the discovery or inspection of a grand jury's recorded proceedings, except as provided in Rules 6, 12(h), 16(a)(1), and 26.2.
[(4) Failure to Call Witness.] (Deleted Dec. 12, 1975)	

[103] On Professor Saltzburg's recommendation, the SSC deleted this sentence from the restyled version.

(b) The Defendant's Disclosure of Evidence. **(1) Information Subject to Disclosure.** **(A) Documents and Tangible Objects.** If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.	**(b) Defendant's Disclosure.** **(1)** ***Disclosable Information.*** OTHER (A) ***Documents and Objects.*** If the defendant requests disclosure under Rule 16(a)(1)(E), then upon compliance and the government's request, the defendant must permit the government to inspect and copy, or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if: (i) the item is within the defendant's possession, custody, or control; and (ii) the defendant intends to use the item in the defendant's case-in-chief at trial.
(B) Reports of Examinations and Tests. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports related to that witness' testimony.	(B) ***Reports of Examinations and Tests.*** If the defendant requests disclosure under Rule 16(a)(1)(F), then upon compliance and the government's request, the defendant must permit the government to inspect and copy, or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if: (i) the item is within the defendant's possession, custody, or control; and (ii) the defendant intends to use the item in the defendant's case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony.[104]
(C) Expert Witnesses. If the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, the defendant, at the government's request, must disclose to the government a written summary of testimony the defendant intends to use under Rules 702, 703 and 705 of the Federal Rules of Evidence as evidence at trial. This summary must describe the opinions of the witnesses, the bases and reasons therefor, and the witnesses' qualifications.	(C) ***Expert Testimony.*** If the defendant requests disclosure under Rule 16(a)(1)(G), then upon compliance and the government's request, the defendant must give the government a written summary of any testimony the defendant intends to use as evidence at trial under Federal Rules of Evidence 702, 703, or 705. The summary must describe the witness's opinions, the bases and reasons for these opinions, and the witness's qualifications.

[104] I'd favor combining (A) and (B). The wording of (B) is identical to (A) except for the heading and the last four lines. — JFS.

(2) Information Not Subject To Disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or the defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, the defendant's agents or attorneys.	(2) ***Nondisclosable Information.***[105] Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of: (A) reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; or (B) a statement made to the defendant, or the defendant's attorney or agent, by: (i) the defendant; (ii) a government or defense witness; or (iii) a prospective government or defense witness.
[(3) Failure to Call Witness.] (Deleted Dec. 12, 1975)	
(c) Continuing Duty to Disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, such party shall promptly notify the other party or that other party's attorney or the court of the existence of the additional evidence or material.	(c) **Continuing Duty to Disclose.** A party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other party or the court, if: (1) the evidence or material is subject to discovery or inspection under this rule; and (2) ~~that~~ party previously requested, or the court ordered, its production.
(d) Regulation of Discovery. **(1) Protective and Modifying Orders.** Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.	(d) **Regulating Discovery.** (1) ***Protective and Modifying Orders.*** At any time the court may for good cause deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal.

THE OTHER

NB: "THAT" IS CONFUSING IN THIS CONTEXT

[105] The SSC recommends that Rule 16(b)(2) be shortened to the following: "Except for the things discoverable under Rule 16(b)(1), a defendant is not required to disclose any other information."

THIS HEADER DOES NOT PROPERLY DESCRIBE THE SUBJECT MATTER OF RULE 17(a). WOULD "CONTENT" BE BETTER?

Rule 17. Subpoena	Rule 17. Subpoena
(a) For Attendance of Witnesses; Form; Issuance. A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed[107] to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. A subpoena shall be issued by a United States magistrate judge in a proceeding before that magistrate judge, but it need not be under the seal of the court.	**(a) Witness's Attendance.** A subpoena must state the court's name and the title of the proceeding, include the seal of the court, and command the witness to attend and testify at the time and place the subpoena specifies. The clerk must issue a blank subpoena — signed and sealed — to the party requesting it and that party must fill in the blanks before the subpoena is served.
(b) Defendants Unable to Pay. The court shall order at any time that a subpoena be issued for service on a named witness upon an ex parte application of a defendant upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense. If the court orders the subpoena to be issued, the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government.	**(b) Defendant Unable to Pay.** Upon a defendant's ex parte application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness's fees and the necessity of the witness's presence for an adequate defense. If the court orders a subpoena to be issued, the process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas.
(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive.[108] The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.	**(c) Producing Documents and Objects.** (1) A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them. (2) On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.

[107] Professor Saltzburg approved substituting *witness* for *each person to whom it is directed.*

[108] Professor Saltzburg approved deleting *or oppressive.*

(d) Service. A subpoena may be served by the marshal, by a deputy marshal or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named and by tendering to that person the fee for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof.	**(d) Service.** A marshal, deputy marshal, or any nonparty who is at least 18 years old, may serve a subpoena. The server must deliver a copy of the subpoena to the witness and must tender to the witness one day's witness-attendance fee and the legal mileage allowance. The server need not tender the attendance fee or mileage allowance when the United States, a federal officer, or a federal agency has requested the subpoena.
(e) Place of Service. **(1) In United States.** A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States. **(2) Abroad.** A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C., § 1783.	**(e) Place of Service.** **(1)** ***In the United States.*** A subpoena requiring a witness to attend a hearing or trial may be served at any place within the United States. **(2)** ***In a Foreign Country.*** If the witness is in a foreign country, 28 U.S.C. § 1783 governs the subpoena's service.
(f) For Taking Depositions; Place of Examination. **(1) Issuance.** An order to take a deposition authorizes the issuance by the clerk of the court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. **(2) Place.** The witness whose deposition is to be taken may be required by subpoena to attend at any place designated by the trial court, taking into account the convenience of the witness and the parties.	**(f) Deposition Subpoena.** **(1)** ***Issuance.*** A court order to take a deposition authorizes the clerk in the district where the deposition is to be taken to issue a subpoena for any witness named or described in the order. **(2)** ***Place.*** After considering the convenience of the witness and the parties, the court may order — and the subpoena may require — the witness to appear anywhere the court designates.
(g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a United States magistrate judge.	**(g) Contempt.** The court may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by a federal court in that district. **[to be further studied by Schlueter as to question regarding "court"]**
(h) Information Not Subject to Subpoena. Statements made by witnesses or prospective witnesses may not be subpoenaed from the government or the defendant under this rule but shall be subject to production only in accordance with the provisions of Rule 26.2.	**(h) Information Not Subject to a Subpoena.** No party may subpoena a statement of a witness or of a prospective witness under this rule. Rule 26.2 governs the production of ~~those~~ THE statements.

Rule 19. Rescinded.	Rule 19. [Rescinded.]

Rule 20. Transfer From the District for Plea and Sentence	Rule 20. Transfer for Plea and Sentence
(a) Indictment or Information Pending. A defendant arrested, held, or present in a district other than that in which an indictment or information is pending against that defendant may state in writing a wish to plead guilty or nolo contendere, to waive trial in the district in which the indictment or information is pending, and to consent to disposition of the case in the district in which that defendant was arrested, held, or present, subject to the approval of the United States attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States attorneys, the clerk of the court in which the indictment or information is pending shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant is arrested, held, or present, and the prosecution shall continue in that district. THIS SEEMS TO BE COVERED IN R 20(d)(2) AND SHOULD NOT BE IN RULE 20(b) IT SEEMS, AFTER RESTYLING, TRANSFER IS ONLY UNDER R 20(a)	**(a) Consent to Transfer.** A prosecution may be transferred from the district where the indictment or information is pending, or from which a warrant on a complaint has been issued, to the district where the defendant is arrested, held, or present, if: (1) the defendant states in writing a wish to plead guilty or no contest and to waive trial in the district where the indictment, information, or complaint is pending, consents in writing to the court's disposing of the case in the transferee district, and files the statement in the transferee district; and (2) the United States attorneys in both districts approve the transfer in writing. **(b) Clerk's Duties.** After receiving the defendant's or juvenile's statement and the required approvals, the clerk where the indictment, information, or complaint is pending must send the file, or a certified copy, to the clerk in the transferee district. **(c) Effect of a Not Guilty Plea.** If the defendant pleads not guilty after the case has been transferred under Rule 20(a) ~~or (b)~~, the clerk must return the papers to the court where the prosecution began, and that court must restore the proceeding to its docket. The defendant's statement that the defendant wished to plead guilty or no contest is not, in any civil or criminal proceeding, admissible against the defendant.
(b) Indictment or Information Not Pending. A defendant arrested, held, or present, in a district other than the district in which a complaint is pending against that defendant may state in writing a wish to plead guilty or nolo contendere, to waive venue and trial in the district in which the warrant was issued, and to consent to disposition of the case in the district in which that defendant was arrested, held, or present, subject to the approval of the United States attorney for each district. Upon filing the written waiver of venue in the district in which the defendant is present, the prosecution may proceed as if venue were in such district.	NB: PUT "ADMISSIBLE" AFTER "NOT" TO MAKE THIS LANGUAGE PARALLEL TO THAT OF OTHER RULES e.g. — 12.1(f) 12.2(e) 12.3(e)

(d) Juveniles. A juvenile (as defined in 18 U.S.C. § 5031) who is arrested, held, or present in a district other than that in which the juvenile is alleged to have committed an act in violation of a law of the United States not punishable by death or life imprisonment may, after having been advised by counsel and with the approval of the court and the United States attorney for each district, consent to be proceeded against as a juvenile delinquent in the district in which the juvenile is arrested, held, or present. The consent shall be given in writing before the court but only after the court has apprised the juvenile of the juvenile's rights, including the right to be returned to the district in which the juvenile is alleged to have committed the act, and of the consequences of such consent.	**(d) Juveniles.** (1) ***Consent to Transfer.*** ~~A juvenile~~ may be proceeded against as a juvenile delinquent in the district where the juvenile is arrested, held, or present, if: ~~(A) the~~ individual is AN ~~a~~ juvenile ~~as defined~~ DEFINED AS in 18 U.S.C. § 5031;[111] (A) ~~(B)~~ the alleged offense that occurred in the other district is not punishable by death or life imprisonment; (B) ~~(C)~~ an attorney has advised the juvenile; (C) ~~(D)~~ the court has informed the individual of the juvenile's rights — including the right to be returned to the district where the offense allegedly occurred — and the consequences of waiving those rights; (D) ~~(E)~~ the juvenile, after receiving the court's information about rights, consents in writing to be proceeded against in the transferee district, and files the consent in the transferee district; (E) ~~(F)~~ the United States attorneys for both districts approve the transfer in writing; and (F) ~~(G)~~ the transferee court enters an order approving the transfer. (2) ***Clerk's Duties.*** After receiving the juvenile's written consent and the required approvals, the clerk where the indictment or information or complaint is pending or where the alleged offense occurred must send the file, or a certified copy, to the clerk in the transferee district.[112]

[111] The SSC substituted *federal law* for the U.S. Code citation because "juvenile" may be defined under statutes other than 18 U.S.C. § 5031 if Congress enacts any of the pending bills relating to juvenile offenses.

[112] The SSC has added this paragraph on Professor Saltzburg's suggestion.

Joseph F. Spaniol, Jr.
5602 Ontario Circle
Bethesda, MD 20816

August 17, 1999

John K. Rabiej, Esq.
Rules Committee Support Office
Administrative Office of the U. S. Courts
Washington, DC 205444

BY FAX TO 202-502-1755

Dear John,

This letter responds to Judge Parker's suggested amendments to the July 27, 1999 draft of criminal rules 10-22.

I agree with all of Judge Parker's suggestions on these rules, except for Rules 12.3(a)(2) and 20(b).

In the header to Rule 12.3(a)(2) I do not believe the words "of Notice" should be added. They are not needed.

In Rule 20(b) Judge Parker would strike "or juvenile's statement". While "or juvenile's" could be stricken, I believe the word "statement" should be retained.

Sincerely,

Joe

Joseph F. Spaniol, Jr.

cc: Judge Parker
Bryan Garner, Esq.

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Restyling Project — Rules 22-31 (First Draft of Rules and Notes)**

DATE: **September 9, 1999**

At a meeting on September 1, 1999, Subcommittee A reviewed the Style Subcommittee's suggestion changes to Rules 22-31. The attached draft (Dated September 1, 1999) reflects the proposed version approved by the Subcommittee. Also attached are proposed Committee Notes (First Draft dated September 2, 1999).

Please note that these drafts include substantive changes to Rule 26, approved by the Committee at its April 1999 meeting in Washington, D.C.

VI. TRIAL	TITLE VI. TRIAL
Rule 23. Trial by Jury or by the Court	**Rule 23. Jury or Nonjury Trial**
(a) Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.	**(a) Jury Trial.** If the defendant is entitled to a jury trial, the trial must be by jury unless: (1) the defendant waives a jury trial in writing; (2) the government consents; and (3) the court approves.
(b) Jury of Less Than Twelve. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.	**(b) Jury Size.** **(1)** ***In General.*** A jury consists of 12 persons unless this rule provides otherwise. **(2)** ***Stipulation for a Smaller Jury.*** At any time before the verdict, the parties may, with the court's approval, stipulate in writing that: (A) the jury may consist of less than 12 persons; or (B) a jury of less than 12 persons may return a verdict if the court finds it necessary to excuse a juror for just cause after the trial begins. **(3)** ***Court Order for a Jury of 11.*** After the jury has retired to deliberate, the court may permit a jury of 11 persons to return a verdict, even without a stipulation by the parties, if the court finds just cause to excuse a juror.
(c) Trial Without a Jury. In a case tried without a jury the court shall make a general finding and shall in addition, on request made before the general finding, find the facts specially. Such findings may be oral. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.	**(c) Nonjury Trial.** In a case tried without a jury, the court must find the defendant guilty or not guilty. If a party requests before the finding of guilty or not guilty, the court must state its specific findings of fact in open court or by filing a decision or opinion.

Rule 23
9-2-99 Draft

COMMITTEE NOTE

Rule 23 has been amended to make the rule more easily understood. The Committee has also changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only.

Rule 24. Trial Jurors	Rule 24. Trial Jurors
(a) Examination. The court may permit the defendant or the defendant's attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or the defendant's attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.	**(a) Examination.** **(1)** ***In General.*** The court may examine prospective jurors and may permit the attorneys for the parties to do so. (Subject to further review on uniform use of a "attorneys for parties.") **(2)** ***Court Examination.*** If the court examines the jurors, it must permit the attorneys for the parties to: (A) ask further questions that the court considers proper; or (B) submit further questions that the court may ask if it considers them proper.
(b) Peremptory Challenges. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.	**(b) Peremptory Challenges.** Each side is entitled to the number of peremptory challenges to prospective jurors specified below. The court may permit additional peremptory challenges to multiple defendants, and may permit the defendants to exercise those challenges separately or jointly. **(1)** ***A Crime Punishable by Death.*** Each side has 20 peremptory challenges. **(2)** ***A Crime Punishable by Imprisonment of More Than One Year.*** Each side has 10 peremptory challenges. **(3)** ***A Crime Punishable by Fine, Imprisonment of One Year or Less, or Both.*** Each side has three peremptory challenges.

(c) Alternate Jurors.[1] (1) *In General.* The court may empanel no more than 6 jurors, in addition to the regular jury, to sit as alternate jurors. An alternate juror, in the order called, shall replace a juror who becomes or is found to be unable or disqualified to perform juror duties. Alternate jurors shall (i) be drawn in the same manner, (ii) have the same qualifications, (iii) be subject to the same examination and challenges, and (iv) take the same oath as regular jurors. An alternate juror has the same functions, powers, facilities and privileges as a regular juror. (2) *Peremptory Challenges.* In addition to challenges otherwise provided by law, each side is entitled to 1 additional peremptory challenge if 1 or 2 alternate jurors are empaneled, 2 additional peremptory challenges if 3 or 4 alternate jurors are empaneled, and 3 additional peremptory challenges if 5 or 6 alternate jurors are empaneled. The additional peremptory challenges may be used to remove an alternate juror only, and the other peremptory challenges allowed by these rules may not be used to remove an alternate juror. (3) *Retention of Alternate Jurors.* When the jury retires to consider the verdict, the court in its discretion may retain the alternate jurors during deliberations. If the court decides to retain the alternate jurors, it shall ensure that they do not discuss the case with any other person unless and until they replace a juror during deliberations. If an alternate replaces a regular juror after deliberations have begun, the court shall instruct the jury to begin its deliberations anew.	**(c) Alternate Jurors.** **(1) *In General.*** The court may empanel up to six alternate jurors to replace any jurors who are unable to perform or are disqualified from performing their duties. **(2) *Procedure.*** (A) An alternate juror must have the same qualifications and be selected and sworn in the same manner as any other juror. (B) Alternate jurors replace jurors in the same order in which the alternates were selected. An alternate juror who replaces a juror has the same authority as the other jurors. **(3) *Retention of Alternate Jurors.*** The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew. **(4) *Peremptory Challenges.*** Each side is entitled to the number of additional peremptory challenges to prospective alternate jurors specified below, which may be used only to remove alternate jurors. (A) *One or Two Alternates to be Empaneled.*[2] One additional peremptory challenge. (B) *Three or Four Alternates to be Empaneled.* Two additional peremptory challenges. (C) *Five or Six Alternates to be Empaneled.* Three additional peremptory challenges.

[1] This new language is not yet a part of the rule. It has been approved by the Supreme Court and will take effect on December 1, 1999.

[2] The single-*l* spelling conforms with modern legal usage. — BAG.

Rule 24
9-2-99 Draft

COMMITTEE NOTE

Rule 24 has been amended to make the rule more easily understood. The Committee has also changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only. One substantive change has been made, however.

The amendment to Rule 24(b) equalizes the number of peremptory challenges normally available to the prosecution and the defense in a felony case. Under the amendment, the number of challenges available to the defense would remain the same, ten challenges, and the prosecution's would be increased by four. The number of peremptory challenges in capital and misdemeanor cases would remain unchanged.

In 1976, the Supreme Court adopted and forwarded to Congress amendments to Rule 24(b) which would have reduced and equalized the number of peremptory challenge. Under the proposed change, each side would have been entitled to 20, 5, and 3, respectively in capital, felony, and misdemeanor cases. Order, Amendments to the Federal Rules of Criminal Procedure, 44 U.S.L.W. 4549 (1976). Congress ultimately rejected the proposed changes but recommended that the Judicial Conference study the matter further. Congress' chief concern was that in most federal courts, the trial judge conducts the voir dire, thus making it more difficult for the parties to identify biased jurors. S. Rep. 354, 95th Cong., 1st Sess. 9, reprinted in [1977] U.S. Code Cong. & Ad. News 1477, 1482-83. In 1990, the Advisory Committee on Criminal Rules proposed an amendment to Rule 24(b) which would provided that in a felony case each side would be entitled to 6 peremptory challenges; that result would have been reached by reducing the number available to the defense by four. The Standing Committee ultimately rejected that amendment in 1991. Since then, however, Congress has indicated a willingness to reconsider the number of peremptory challenges available in a felony case. *See* Senate Bill 3 (*Omnibus Crime Control Act of 1997*) (would have equalized the number of challenges at 10 for each side).

The proposed amendment equalizes the number of peremptory challenges for each side without reducing the number available to the defense. While increasing the number of challenges might, in some cases, require more jurors in the initial pool, the Committee believed that on the whole, equalizing the number of challenges is desirable. That result is accomplished in the amendment without reducing the number available to the defense.

Finally, the rule recognizes that in multi-defendant cases, the court in its discretion might grant additional peremptory challenges to the defendants. But, consistent, with the goal of equalization of the number available to each side, in that

instance the prosecution could request additional challenges, not to exceed the total number available to the defendants jointly. The court, however, would not be required to equalize the number of challenges.

Rule 25. Judge; Disability	Rule 25. Judge's Disability
(a) During Trial. If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying familiarity with the record of the trial, may proceed with and finish the trial.	**(a) During Trial.** Any judge regularly sitting in or assigned to the court may complete a jury trial if: (1) the judge before whom the trial began cannot proceed because of death, sickness, or other disability; and (2) the judge completing the trial certifies familiarity with the trial record.
(b) After Verdict or Finding of Guilt. If by reason of absence, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if that judge is satisfied that a judge who did not preside at the trial cannot perform those duties or that it is appropriate for any other reason, that judge may grant a new trial.	**(b) After a Verdict or Finding of Guilty.** (1) After a verdict or finding of guilty, any judge regularly sitting in or assigned to a court may complete the court's duties if the judge before whom the trial began cannot perform those duties because of absence, death, sickness, or other disability. (2) The "new" **(study further to obtain better word)** judge may grant a new trial if satisfied that: (A) a judge who did not preside over the trial cannot perform the post-trial duties; or (B) a new trial is appropriate for some other reason.

Rule 25
9-2-99 Draft

COMMITTEE NOTE

Rule 25 has been amended to make the rule more easily understood. The Committee has also changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only.

Rule 26. Taking of Testimony	Rule 26. Taking Testimony
In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress, or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court. *(a)*[3] ***In General.*** *In all trials the testimony of witnesses shall be taken in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court.* *(b)* ***Transmission of Testimony from Different Location.*** *The court may authorize—in the interest of justice—contemporaneous video presentation of testimony in open court from a different location if:* *(i) the requesting party establishes compelling circumstances for such transmission;* *(ii) appropriate safeguards for such transmission are used; and* *(iii) the witness is unavailable within the meaning of Rule 804(a) of the Federal Rules of Evidence.*	**(a) In General.** In all trials the testimony of witnesses must be taken in open court, unless otherwise provided by an Act of Congress or by rules adopted under chapter 131 of title 28, United States Code. **(b) Transmission of Testimony from Different Location.** The court may authorize—in the interest of justice— contemporaneous video presentation of testimony in open court from a different location if: (i) the requesting party establishes compelling circumstances for such transmission; (ii) appropriate safeguards for such transmission are used; and (iii) the witness is unavailable within the meaning of Rule 804(a) of the Federal Rules of Evidence.

[3] This italicized language is not yet a part of the rule. It has been approved by the Advisory Committee, but not yet presented to the Standing Committee Style Subcommittee.

Rule 26
9-2-99 Draft

COMMITTEE NOTE

Rule 26 has been amended to make the rule more easily understood. The Committee has also changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only. One substantive change has been made, however.

Amended Rule 26(b) is intended to permit a court to receive the video transmission of an absent witness if certain conditions are met. As currently written, Rule 26 indicates that normally only testimony given in open court will be considered, unless otherwise provided by the rules, an Act of Congress, or any other rule authorized by the Supreme Court. One of those exceptions is located in Rule 15. That Rule recognizes that a deposition may be used "[w]henever due to exceptional circumstances of the case it is in the interest of justice that testimony of a prospective witness of a party be taken and preserved for use at trial." If that witness is "unavailable" under Federal Rule of Evidence 804(a), then the deposition may be used as substantive evidence. The amendment extends the logic underlying that hearsay exception to contemporaneous video testimony of an unavailable witness. The amendment generally parallels a similar provision in Federal Rule of Civil Procedure 43.

The Committee believed that permitting use of video transmission of testimony only in those instances where deposition testimony could be used is a prudent and measured step. Thus, the proponent of the testimony must establish that there are exceptional circumstances for such transmission. A party against whom a deposition may be introduced at trial will normally have no basis for objecting if contemporaneous testimony is used instead. Indeed, the use of such transmitted testimony is in most regards the closest thing to having the witness actually in the court room. For example, the participants in the court room can see for themselves the demeanor of the witness and hear any pauses in the testimony, matters which are not normally available in non-video deposition testimony. Although deposition testimony is normally taken with all counsel and parties present with the witness, those are not absolute requirements. *See, e.g., United States v. Salim*, 855 F.2d 944, 947-48 (2d Cir. 1988) (conviction affirmed where deposition testimony used although defendant and her counsel were not permitted in same room with witness, witness' lawyer answered some questions, lawyers were not permitted to question witness directly, and portions of proceedings were not transcribed verbatim.

The Committee recognized that there is a need for the trial court to impose appropriate safeguards and procedures, as required, to insure that the accuracy and quality of the transmission, the ability of any jurors to hear and view the testimony, and

the ability of the judge, counsel, and the witness to hear and understand each other during questioning. *See, e.g., United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999). What those safeguards may be is left to the sound discretion of the trial court.

Where the prosecution is presenting the contemporaneous transmission of a government witness, there may be a question or objection on grounds that the defendant's confrontation rights are being infringed. The Committee believes that including the requirement of "unavailability" as that term is defined in Federal Rule of Evidence, which permits use of certain deposition testimony, should normally insure that those rights are not infringed.

In deciding whether to permit contemporaneous transmission of the testimony of a government witness, the Supreme Court's decision in *Maryland v. Craig*, 497 U.S. 836 (1990) is instructive. In that case, the prosecution presented the testimony of a child sexual assault victim from another room by way of one-way closed circuit television. The Court outlined four elements which underlie Confrontation Clause issues: (1) physical presence; (2) the oath; (3) cross-examination; and (4) the opportunity for the trier-of-fact to observe the witness' demeanor. *Id.* at 847. The Court rejected the notion that a defendant's Confrontation Clause rights could be protected only if all four elements were present. In this case, the trial court had explicitly concluded that the procedure was necessary to protect the child witness, i.e., the witness was psychologically unavailable to testify in open court. The Court noted that any harm to the defendant resulting from the transmitted testimony was minor because the defendant received most of the protections contemplated by the Confrontation Clause, i.e., the witness was under oath, counsel could cross-examine the absent witness, and the jury could observe the demeanor of the witness. *See also United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999) (use of remote transmission of unavailable witness did not violate confrontation clause).

While the amendment is not limited to instances such as those encountered in *Craig*, it is limited to situations where the witness is unavailable for any of the reasons set out in Federal Rule of Evidence 804(a). Whether under the particular circumstances proposed transmission will satisfy some, or all, of the four protective factors identified by the Supreme Court in *Craig,* is a decision left to the trial court.

Rule 26.1. Determination of Foreign Law	Rule 26.1. Foreign Law Determination
A party who intends to raise an issue concerning the law of a foreign country shall give reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party[4] or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.	A party who intends to raise an issue of foreign law must provide the court and all parties with reasonable written notice. Issues of foreign law are questions of law, but in deciding such issues a court may consider any relevant material or source — including testimony — without regard to the Federal Rules of Evidence.

[4] Shouldn't the language *submitted by a party* be continued? — JFS.

Rule 26.1
9-2-99 Draft

COMMITTEE NOTE

Rule 26.1 has been amended to make the rule more easily understood. The Committee has also changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only.

Rule 26.2. Production of Witness Statements	Rule 26.2. Producing a Witness's Statement
(a) Motion for Production. After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the government or the defendant and the defendant's attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.	**(a) Motion to Produce.** After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, must order the attorney for the government or the defendant and the defendant's attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.
(b) Production of Entire Statement. If the entire contents of the statement relate to the subject matter concerning which the witness has testified, the court shall order that the statement be delivered to the moving party.	**(b) Producing the Entire Statement.** If the entire statement relates to the subject matter of the witness's testimony, the court must order that the statement be delivered to the moving party.
(c) Production of Excised Statement. If the other party claims that the statement contains privileged information or matter that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise the portions of the statement that are privileged or that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion of the statement that is withheld from the defendant over the defendant's objection must be preserved by the attorney for the government, and, if the defendant appeals a conviction, must be made available to the appellate court for the purpose of determining the correctness of the decision to excise the portion of the statement.	**(c) Producing an Excised Statement.** If the party who called the witness claims that the statement contains information that is privileged or does not relate to the subject matter of the witness's testimony, the court must inspect the statement in camera. After excising any privileged or unrelated portions, the court must order delivery of the excised statement to the moving party. If the defendant objects to an excision, the court must preserve the entire statement under seal as part of the record.
(d) Recess for Examination of Statement. Upon delivery of the statement to the moving party, the court, upon application of that party, may recess the proceedings so that counsel may examine the statement and prepare to use it in the proceedings.	**(d) Recess to Examine a Statement.** The court may recess the proceedings to allow time for the **(moving party)(Check for consistency)** to examine the statement and prepare for its use.
(e) Sanction for Failure to Produce Statement. If the other party elects not to comply with an order to deliver a statement to the moving party, the court shall order that the testimony of the witness be stricken from the record and that the trial proceed, or, if it is the attorney for the government who elects not to comply, shall declare a mistrial if required by the interest of justice.	**(e) Sanction for Failure to Produce or Deliver a Statement.** If the party who called the witness disobeys an order to produce or deliver a statement, the court must strike the witness's testimony from the record. If the government attorney disobeys the order, the court must declare a mistrial if justice so requires.

(f) Definition. As used in this rule, a "statement" of a witness means: **(1)** a written statement made by the witness that is signed or otherwise adopted or approved by the witness; **(2)** a substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof; or **(3)** a statement, however taken or recorded, or a transcription thereof, made by the witness to a grand jury.	**(f) Definition.** As used in this rule, a witness's "statement" means: (1) a written statement that the witness makes and signs, or otherwise adopts or approves; (2) a substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in a stenographic or other recording, or a transcription of such a recording; or (3) the witness's statement to a grand jury, however taken or recorded, or a transcription of such a statement.
(g) Scope of Rule. This rule applies at a suppression hearing conducted under Rule 12, at trial under this rule, and to the extent specified: **(1)** in Rule 32(c)(2) at sentencing; **(2)** in Rule 32.1(c) at a hearing to revoke or modify probation or supervised release; **(3)** in Rule 46(i) at a detention hearing; **(4)** in Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255; and **(5)** in Rule 5.1 at a preliminary examination.	**(g) Scope** . This rule applies at trial, at a suppression hearing under Rule 12, and to the extent specified in the following rules: **(1)** Rule 5.1 (preliminary hearing); **(2)** Rule 32(c)(2) (sentencing); **(3)** Rule 32.1(c) (hearing to revoke or modify probation or supervised release); **(4)** Rule 46(i) (detention hearing); and **(5)** Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255.

Rule 26.2
9-2-99 Draft

COMMITTEE NOTE

Rule 26.2 has been amended to make the rule more easily understood. The Committee has also changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only. One substantive change has been made, however.

Current Rule 26.2(c) states that if the court withholds a portion of a statement, over the defendant's possession, "the attorney for the government" must preserve the statement. The Committee believed that the better rule would be for the court to simply seal the entire statement as a part of the record, in the event that there is an appeal.

Rule 26.3. Mistrial	Rule 26.3. Mistrial
Before ordering a mistrial, the court shall provide an opportunity for the government and for each defendant to comment on the propriety of the order, including whether each party consents or objects to a mistrial, and to suggest any alternatives.	Before ordering a mistrial, the court must give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives.

Rule 26.3
9-2-99 Draft

COMMITTEE NOTE

Rule 26.3 has been amended to make the rule more easily understood. The Committee has also changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only.

Rule 27. Proof of Official Record	Rule 27. Proof of Official Record
An official record or an entry therein or the lack of such a record or entry may be proved in the same manner as in civil actions.	A party may prove an official record, an entry in such a record, or the lack of a record or entry in the same manner as in a civil action.

Rule 27
9-2-99 Draft

COMMITTEE NOTE

Rule 28 has been amended to make the rule more easily understood. The Committee has also changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only.

Rule 28. Interpreters	Rule 28. Interpreters
The court may appoint an interpreter of its own selection and may fix the reasonable compensation of such interpreter. Such compensation shall be paid out of funds provided by law or by the government, as the court may direct.	The court may select, appoint and fix the reasonable compensation for an interpreter. The compensation must be paid from funds provided by law or by the government, as the court may direct.

Rule 28
9-2-99 Draft

COMMITTEE NOTE

Rule 28 has been amended to make the rule more easily understood. The Committee has also changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only.

Rule 29. Motion for Judgment of Acquittal	Rule 29. Motion for Acquittal
(a) Motion Before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If the defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.	**(a) Before Submission to the Jury.** After either side closes its evidence, the court on the defendant's motion must order acquittal of any offense if the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so. **(Review further)**
(b) Reservation of Decision on Motion. The court may reserve decision on a motion for judgment of acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves a decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.	**(b) Reserving Decision.** The court may reserve decision on a motion for acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.
(c) Motion After Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.	**(c) After Jury Discharge.** **(1)** ***In General.*** The defendant may move for acquittal, or renew such a motion, within seven days after a guilty verdict or after the court discharges the jury, or at any other time the court fixes during the seven-day period. **(2)** ***Ruling on Motion.*** If the jury returns a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury fails to return a verdict, the court may enter an acquittal. **(3)** ***No Prior Motion.*** A defendant is not required to move for acquittal before the court submits the case to the jury as a prerequisite to moving for acquittal after jury discharge.

(d) Same: Conditional Ruling on Grant of Motion. If a motion for judgment of acquittal after verdict of guilty under this Rule is granted, the court shall also determine whether any motion for a new trial should be granted if the judgment of acquittal is thereafter vacated or reversed, specifying the grounds for such determination. If the motion for a new trial is granted conditionally, the order thereon does not affect the finality of the judgment. If the motion for a new trial has been granted conditionally and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. If such motion has been denied conditionally, the appellee on appeal may assert error in that denial, and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.	**(d) Conditional Ruling on a Motion for a New Trial.** **(1)** ***Motion for a New Trial.*** If the court grants a Rule 29(c) motion for acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the acquittal is later vacated or reversed. The court must specify the reasons for that determination. **(2)** ***Finality.*** The court's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal. **(3)** ***Appeal.*** (A) *Grant of a Motion for a New Trial.* If the court conditionally grants a motion for a new trial, and an appellate court later reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise. (B) *Denial of a Motion for a New Trial.* If the court conditionally denies a motion for a new trial, an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial court must proceed as the appellate court directs.

Rule 29
9-2-99 Draft

COMMITTEE NOTE

Rule 29 has been amended to make the rule more easily understood. The Committee has also changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only.

The first sentence in the rule, abolishing "directed verdicts," has been deleted as being unnecessary.

[Subcommittee A questioned whether the current Rule 29(a) requires a judge to sua sponte aquit a defendant if the judge believes that the evidence is insufficient.]

Rule 29.1. Closing Argument	29.1. Closing Argument
After the closing of evidence the prosecution shall open the argument. The defense shall be permitted to reply. The prosecution shall then be permitted to reply in rebuttal.	Closing arguments proceed in the following order: (a) the government argues; (b) the defense argues; and (c) the government rebuts.

Rule 29.1
9-2-99 Draft

COMMITTEE NOTE

Rule 29.1 has been amended to make the rule more easily understood. The Committee has also changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only.

Rule 30. Instructions	Rule 30. Jury Instructions
At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to all parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court may instruct the jury before or after the arguments are completed or at both times. No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.	**(a) In General.** Any party may request in writing that the court instruct the jury on the law as specified in the request. The request must be made at the close of the evidence or at any earlier time that the court reasonably directs. At the same time the requesting party must furnish a copy of the request to every other party. **(b) Ruling on a Request.** The court must inform the attorneys for the parties before closing arguments how it intends to rule on the requested instructions. **(c) Time for Giving Instructions.** The court may instruct the jury before or after the arguments are completed, or at both times. **(d) Objections to Instructions.** (A party who objects to any portion of the instructions or a failure to instruct must inform the court of the specific objections and the grounds for the objection before the jury begins deliberating.)**(Alternative language provided by Prof. Saltzburg.)** No party may appeal from any portion of the charge,[5] or from anything omitted, unless the party objects before the jury begins deliberating and states the objection distinctly and the grounds for the objection. An opportunity must be given to object out of the jury's hearing and, on request, out of the jury's presence.

[5] Do folks nowadays know what *the charge* is? I like it as is, but should we change it to *the instructions* for these Johnny-come-lately, modernistic tyros? — WRW.

Rule 30
9-2-99 Draft

COMMITTEE NOTE

Rule 30 has been amended to make the rule more easily understood. The Committee has also changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only.

[In 1998 the Committee considered possible amendments to Rule 30(d) to parallel similar language in Civil Rule 51. The Civil Rules Committee was exploring ways of making it clear what counsel must do to preserve error vis a vis instructions errors. Subcommittee A tentatively approved language that would simply state: "A party who objects to any portion of the instructions or a failure to instruct must inform the court of the specific grounds for the objections before the jury begins deliberating." That language would replace existing Rule 30(d). The intent would be to retain the requirement of contemporaneous objection and would not address the topic of plain error which is already covered in Rule 52.]

Rule 31. Verdict	Rule 31. Jury Verdict
(a) Return. The verdict shall be unanimous. It shall be returned by the jury to the judge in open court.	**(a) Return.** The jury must return its verdict to the judge in open court. The verdict must be unanimous.
(b) Several Defendants. If there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.	**(b) Multiple Defendants.** If there are multiple defendants, the jury may return a verdict at any time during its deliberations as to any defendant as to whom it has agreed. If the jury cannot agree to a verdict on all defendants, the court may retry any defendant as to whom the jury could not agree. **[Further review by Prof. Schlueter]**
(c) Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.	**(c) Lesser Offense or Attempt.** A defendant may be found guilty of any of the following: (1) an offense necessarily included in the offense charged; (2) an attempt to commit the offense charged; or (3) an offense necessarily included in the attempt to commit the offense charged, if the attempt is an offense in its own right.
(d) Poll of Jury. After a verdict is returned but before the jury is discharged, the court shall, on a party's request, or may on its own motion, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.	**(d) Jury Poll.** After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own motion, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.
(e) Criminal Forfeiture. [Abrogated][6]	**(e) Criminal Forfeiture.** [Abrogated]

[6] This new language is not yet a part of the rule. It has been approved by the Judicial Conference and will be acted on by the Supreme Court before May 1, 2000.

Rule 31
9-2-99 Draft

COMMITTEE NOTE

Rule 31 has been amended to make the rule more easily understood. The Committee has also changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only.

[Professor Schlueter is researching whether there are any cases regarding the ability of the jury to return partial verdicts where there are multiple defendants, as noted in Rule 31(b)]

LEONIDAS RALPH MECHAM
Director

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Associate Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

September 13, 1999

MEMORANDUM TO CRIMINAL RULES COMMITTEE

SUBJECT: *Proposed Amendments to the Federal Rules of Civil Procedure Regarding Electronic Service*

I am attaching the proposed amendments to Civil Rules 5, 6, and 77, which were published for public comment on August 15. A footnote to Rule 5 highlights that Criminal Rule 49 applies the rules governing service in a civil action to service in a criminal proceeding. The report accompanying the proposed amendments, which explains their purpose, is also attached.

John K. Rabiej

MEMORANDUM

To: Honorable Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure

From: Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules

Date: May 11, 1999

Re: Report of the Advisory Committee on Civil Rules

I. INTRODUCTION

At its meeting on April 19 and 20, 1999, in Gleneden Beach, Oregon, the Civil Rules Advisory Committee approved recommendations for the adoption of the three rules packages that were published for comment in August 1998.

* * * * *

At the meeting, the Committee also approved proposals for electronic service with the recommendation that they be published for comment if the Standing Committee determines that the time has come to move toward electronic service.*

* * * * *

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* At its June 14-15, 1999 meeting, the Standing Committee authorized the publication of proposed amendments to Civil Rules 5(b) and 77.

III Action Item: Electronic Service for Possible Publication

The Standing Committee Technology Subcommittee has recommended that the time has come to publish for comment proposed rules to authorize electronic service of papers other than the initial summons or other process, subpoenas, or the Civil Rule 71A(c)(3) notice in condemnation proceedings. At a February meeting of the Subcommittee, it was agreed that the Civil Rules Advisory Committee should take the lead by drafting Civil Rules amendments providing for electronic service. It also was agreed that the amendments would permit electronic service only with the consent of the person served. Proposed amendments of Civil Rules 5(b), 6(e), and 77(d) were prepared and circulated to the other advisory committees for comment. Many of the suggestions from the other advisory committees have been incorporated in the drafts set out below. Some of the suggestions were discussed and not adopted by the Civil Rules Committee.

The Civil Rules Committee believes that if the Standing Committee determines that electronic service rules should be published for comment this summer, the proposed Civil Rule provisions have matured to a point that makes them suitable for publication.

Although the occasion for drafting Rule 5(b) provisions has been the desire to facilitate electronic service, the draft also authorizes service by "other means" consented to by the person served. The Appellate Rules Advisory Committee asked why consent should be required for service by commercial carrier, noting that Appellate Rule 25(c) authorizes service "by mail, or by third-party commercial carrier for delivery within 3 calendar days" without requiring consent by the person served. The Civil Rules Committee concluded that consent should be required. A party who desires to make a commercial carrier its agent to effect personal service by

delivery, bearing the risk that delivery will not be made, can do so under the personal service provisions of Rule 5(b). Consent should be required if service is to be complete on delivery to the carrier for at least three reasons. The universe of commercial carriers includes those that may not be as reliable as the most familiar carriers. Even some of the most reliable commercial carriers make it awkward to accomplish delivery at a residential address. And Civil Rule 5(b) covers a far wider range of papers, with more multifarious consequences, than are covered by Appellate Rule 25(c).

Discussion at the Technology Subcommittee meeting agreed on the concept that electronic service should be complete upon dispatch by the person making service. On the advice of the technology support staff in the Administrative Office, the word chosen to express this concept was "transmission." All of the advisory committees continue to adhere to this concept. The person being served, by giving consent, assumes the responsibility to monitor the agreed-upon mode of delivery. The Civil Rules Committee, responding to a specific suggestion by the Appellate Rules Committee, concluded that it is sufficient to use the Committee Note to state that the transmitter's actual knowledge that delivery has not been made defeats the presumption that service is complete on transmission. Although the Civil Rules Committee voted in favor of the "transmission" proposal by a margin of 9 to 2, it also agreed unanimously that public comment should be sought on the alternative that would make electronic service complete on receipt.

Electronic filing opens up the possibility that electronic service can be made through the court's system. The Civil Rules Committee concluded that this possibility should be made available. To protect courts that are not prepared for this step, authorization by local rule is required. In addition, this final sentence of proposed Rule 5(b)(2)(D) makes it explicit that service is made by the party through the court's facilities; it is not the court that is making service.

Many suggestions were made for expanding the Committee Note to illustrate the variety of electronic-service questions that might be addressed by local rules. The Appellate Rules Advisory Committee suggested that the text of Rule 5(b) should itself address "the ability of courts to use local rules to regulate electronic service." The Civil Rules Committee concluded that it is better to avoid any elaborate discussion of the issues that may arise. Present experience is very limited, and the ratio between foreseeable and unforeseeable issues is unfavorable. The draft Committee Note was shortened by deleting some of the suggestions for addressing the mode of consent.

Electronic service raises the question whether to allow additional time to respond in the way that Civil Rule 6(e) now provides an additional 3 days after service by mail. A draft Rule 6(e) and three alternatives were presented for discussion. All of these alternatives are preserved in the materials set out below. Those who favored allowing additional time following service by any means that requires consent of the person served urged that consent is more likely to be given if it brings the reward of added time. The Appellate Rules Advisory Committee urged the opposite view — that consent is less likely to be sought if the person making service must pay the price of granting additional time. Additional time also was supported on the ground that the time from personal service runs only from the moment of actual notice. Electronic mail is not always instantaneous, even when it does eventually arrive, and Appellate Rule 25(c) itself recognizes the practices of commercial carriers by authorizing "delivery within 3 calendar days." Those who opposed allowing additional time noted that practicing attorneys often consent to electronic or other modes of service now. Consent is given only for reliable and expeditious means of delivery, and it is given to take advantage of those means. Additional time is not required. The Civil Rules Committee resolved these arguments by casting 6 votes for "Alternative 1," which — by making no change in Rule 6(e) — would not allow any additional time for responding. Four votes,

however, were cast for "Alternative 3," a draft that amends Rule 6(e) to allow an additional 3 days following service by mail "or by a means permitted only with the consent of the party served." This means of expression facilitates incorporation in the Bankruptcy Rules, and should be published for comment as an alternative approach.

Finally Rule 77(d) would be amended to permit the clerk of court to give notice of the entry of an order or judgment by any means authorized by Rule 5(b). By invoking Rule 5(b), this draft allows use of electronic or other non-mail means only with the consent of the person receiving notice. This proposal was accepted without independent discussion.

One last word on style. The only comments from the Style Subcommittee were based on the outstanding draft that restyles all of the Civil Rules. The Civil Rules Committee concluded that the schedule of this project, urged by the Technology Subcommittee, should not be delayed while all of these style changes are considered. One illustration of the questions that arise from the style draft is provided by the suggestion that service on a person "residing" in a home be changed to service on a person "living" in a home. There may be subtle differences in the meaning of these two words; which concept is more suitable requires some thought. The style aim has been to put the elements of current Rule 5(b) into a clear organization without undertaking the additional work that would be required to consider each of the more dramatic changes that might be made.

Following discussion at the Standing Committee meeting, it was concluded that Rules 5(b) and 77(d) should be published for comment in tandem with parallel provisions for the Bankruptcy Rules. Comment is specifically invited on these questions: (1) Whether electronic service should be made complete on "transmission," or whether instead it should be made complete only

on "receipt" or some other event. (2) Whether additional time should be provided in Civil Rule 6(e) to respond to papers served by electronic means or by other means permitted with the consent of the person served. A proposed amendment of Rule 6(e) is published for this purpose, in a form adapted for easy incorporation into the Bankruptcy Rules. (3) Whether there are distinctive considerations that suggest that different electronic service rules should be adopted for the Appellate Rules or Criminal Rules.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 5. Service and Filing of Pleadings and Other Papers

* * * * *

~~**(b) Same: How Made.** Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party or by mailing it to the attorney or party at the attorney's or party's last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at the attorney's or party's office with a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a~~

*New matter is underlined; matter to be omitted is lined through.

~~conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.~~

(b) Making Service.*

(1) Service under Rules 5(a) and 77(d) on a party represented by an attorney is made on the attorney unless the court orders service on the party.

(2) Service under Rule 5(a) is made by:

(A) Delivering a copy to the person served by:

(i) handing it to the person;

(ii) leaving it at the person's office with a clerk or other person in charge, or if no one is in

---

* Criminal Rule 49 applies the rules governing service in a civil action to service in a criminal proceeding.

charge leaving it in a conspicuous place in the office; or

(iii) if the person has no office or the office is closed, leaving it at the person's dwelling house or usual place of abode with someone of suitable age and discretion residing there.

(B) Mailing a copy to the last known address of the person served. Service by mail is complete on mailing.

(C) If the person served has no known address, leaving a copy with the clerk of the court.

(D) Delivering a copy by any other means, including electronic means, consented to by the person served. Service by electronic means is complete on transmission; service by other consented means is complete when the person making service

delivers the copy to the agency designated to make delivery. If authorized by local rule, a party may make service under this subparagraph (D) through the court's transmission facilities.

* * * * *

Committee Note

Rule 5(b) is restyled.

Rule 5(b)(1) makes it clear that the provision for service on a party's attorney applies only to service made under Rules 5(a) and 77(d). Service under Rules 4, 4.1, 45(b), and 71A(d)(3) — as well as rules that invoke those rules — must be made as provided in those rules.

Subparagraphs (A), (B), and (C) of Rule 5(b)(2) carry forward the method-of-service provisions of former Rule 5(b).

Subparagraph (D) of Rule 5(b)(2) is new. It authorizes service by electronic means or any other means, but only if consent is obtained from the person served. Early experience with electronic filing as authorized by Rule 5(d) is positive, supporting service by electronic means as well. Consent is required, however, because it is not yet possible to assume universal entry into the world of electronic communication. Subparagraph (D) also authorizes service by nonelectronic means. The Rule 5(b)(2)(B) provision making mail

service complete on mailing is extended in subparagraph (D) to make service by electronic means complete on transmission; transmission is effected when the sender does the last act that must be performed by the sender. As with other modes of service, however, actual notice that the transmission was not received defeats the presumption of receipt that arises from the provision that service is complete on transmission. The sender must take additional steps to effect service. Service by other agencies is complete on delivery to the designated agency.

Finally, subparagraph (D) authorizes adoption of local rules providing for service through the court. Electronic case filing systems will come to include the capacity to make service by using the court's facilities to transmit all documents filed in the case. It may prove most efficient to establish an environment in which a party can file with the court, making use of the court's transmission facilities to serve the filed paper on all other parties. Because service is under subparagraph (D), consent must be obtained from the persons served.

Service under subparagraph (D) does not allow the additional time provided by Rule 6(e) when service is made by mail under subparagraph (B). Electronic service commonly is effected with great speed. A party should consent to receive service by electronic or other means only as to modes that are trusted to provide prompt actual notice. By giving consent, a party also accepts the responsibility to monitor the appropriate facility for receiving service.

ALTERNATIVE PROPOSAL

The Advisory Committee recommends that no change be made in Civil Rule 6(e) to reflect the provisions of Civil Rule 5(b)(2)(D) that, with the consent of the person to be served, would allow service by electronic or other means. Absent change, service by these means would not affect the time for acting in response to the paper served. Comment is requested, however, on the alternative that would allow an additional 3 days to respond. The alternative Rule 6(e) amendments are cast in a form that permits ready incorporation in the Bankruptcy Rules.*

Rule 6. Time

* * * * *

(e) Additional Time After Service ~~by Mail~~ under Rule 5(b)(2)(B), (C), or (D). Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party

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* Compare proposed amendments to Bankruptcy Rule 9006(f) contained on page 18 of this pamphlet, which extends the 3-day rule to service by electronic means.

~~by mail~~ under Rule 5(b)(2)(B), (C), or (D), 3 days shall be added to the prescribed period.

Committee Note

The additional three days provided by Rule 6(e) is extended to the means of service authorized by the new paragraph (D) added to Rule 5(b), including — with the consent of the person served — service by electronic or other means. The three-day addition is provided as well for service on a person with no known address by leaving a copy with the clerk of the court.

Rule 65. Injunctions

* * * * *

(f) Copyright Impoundment. This rule applies to copyright impoundment proceedings.

Committee Note

New subdivision (f) is added in conjunction with abrogation of the antiquated Copyright Rules of Practice adopted for proceedings under the 1909 Copyright Act. Courts have naturally turned to Rule 65 in response to the apparent inconsistency of the former Copyright Rules with the discretionary impoundment procedure adopted in 1976, 17 U.S.C. § 503(a). Rule 65 procedures also have assuaged well-founded doubts whether the Copyright Rules satisfy more contemporary requirements of due process. *See, e.g., Religious*

Rule 77. District Courts and Clerks

* * * * *

(d) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry ~~by mail~~ in the manner provided for in Rule 5(b) upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Any party may in addition serve a notice of such entry in the manner provided in Rule 5(b) for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

Committee Note

Rule 77(d) is amended to reflect changes in Rule 5(b). A few courts have experimented with serving Rule 77(d) notices by electronic means on parties who consent to this procedure. The

success of these experiments warrants express authorization. Because service is made in the manner provided in Rule 5(b), party consent is required for service by electronic or other means described in Rule 5(b)(2)(D). The same provision is made for a party who wishes to ensure actual communication of the Rule 77(d) notice by also serving notice. As with Rule 5(b), local rules may establish detailed procedures for giving consent.

Rule 81. Applicability in General

(a) ~~To What~~ Proceedings to Which the Rules Apply~~icable~~.

(1) These rules do not apply to prize proceedings in admiralty governed by Title 10, U.S.C., §§ 7651-7681. They do ~~not~~ apply to proceedings in bankruptcy as provided by the Federal Rules of Bankruptcy Procedure ~~or to proceedings in copyright under Title 17, U.S.C., except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States. They do not apply to mental health proceedings in the~~

II-1

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JOHN K. RABIEJ
Chief
Rules Committee Support Office

September 13, 1999

MEMORANDUM TO ADVISORY COMMITTEE ON CRIMINAL RULES

SUBJECT: *Pending Legislation*

The following bills were introduced in Congress, which would affect the Criminal Rules:

1. Senator Thurmond introduced S. 32 (untitled) on January 19, 1999. It would amend Rule 31 and provide for a five-sixths jury vote for conviction.

2. Senator Grassley introduced S. 721 (untitled) and Representative Chabot introduced H.R. 1281 (untitled) both on March 25, 1999. The bills would authorize cameras in the courtroom in civil and criminal cases under guidelines prescribed by the Judicial Conference.

3. Senator Leahy introduced the "Crime Victims Assistance Act" (S. 934) on April 30, 1999. Section 121 would amend Rule 11 to require that victims be notified of a plea agreement and given an opportunity to address the court on the proposed plea agreement. Section 122 would amend Rule 32 to require that victims be notified of an opportunity to complete an impact statement for inclusion in the presentence report. Section 123 would Rule 32.1 to require that victims be notified of a probation revocation proceeding and given an opportunity to address the court.

4. House Joint Resolution 64 was introduced on August 4, 1999. The resolution would initiate the constitutional amendment process to provide for victims' rights.

5. Senator Hatch introduced the "21st Century Justice Act of 1999" (S. 899) on April 28, 1999. The bill contains several provisions that would directly amend the Criminal Rules. Most of these provisions had been introduced in earlier congresses and letters from rules committees' objecting to the provisions had been transmitted to the Senate and House Judiciary Committees.

We are monitoring the bills and will keep the committee apprised of any significant movement in their progress. Excerpts of the pertinent provisions are attached.

John K. Rabiej

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To eliminate a requirement for a unanimous verdict in criminal trials in Federal courts. (Introduced in the Senate)

S 32 IS

106th CONGRESS

1st Session

S. 32

To eliminate a requirement for a unanimous verdict in criminal trials in Federal courts.

IN THE SENATE OF THE UNITED STATES

January 19, 1999

Mr. THURMOND introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To eliminate a requirement for a unanimous verdict in criminal trials in Federal courts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. AMENDMENT OF RULE 31 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

(a) IN GENERAL- Rule 31(a) of the Federal Rules of Criminal Procedure is amended by striking `unanimous' and inserting `by five-sixths of the jury'.

(b) APPLICABILITY- The amendment made by subsection (a) shall apply to cases pending or commenced on or after the date of enactment of this Act.

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To allow media coverage of court proceedings. (Introduced in the Senate)

S 721 IS

106th CONGRESS

1st Session

S. 721

To allow media coverage of court proceedings.

IN THE SENATE OF THE UNITED STATES

March 25, 1999

Mr. GRASSLEY (for himself, Mr. SCHUMER, Mr. LEAHY, Mr. FEINGOLD, and Mr. MOYNIHAN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To allow media coverage of court proceedings.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. AUTHORITY OF PRESIDING JUDGE TO ALLOW MEDIA COVERAGE OF COURT PROCEEDINGS.

(a) AUTHORITY OF APPELLATE COURTS- Notwithstanding any other provision of law, the presiding judge of an appellate court of the United States may, in his or her discretion, permit the photographing, electronic recording, broadcasting, or televising to the public of court proceedings over which that judge presides.

(b) Authority of District Courts-

(1) IN GENERAL- Notwithstanding any other provision of law, any presiding judge of a district court of the United States may, in his or her discretion, permit the photographing, electronic recording, broadcasting, or televising to the public of court proceedings over which that judge presides.

(2) OBSCURING OF WITNESSES- (A) Upon the request of any witness in a trial proceeding other than a party, the court shall order the face and voice of the witness to be disguised or otherwise obscured in such manner as to render the witness unrecognizable to the broadcast audience of the trial proceeding.

(B) The presiding judge in a trial proceeding shall inform each witness who is not a party that the witness has the right to request that his or her image and voice be obscured during the witness' testimony.

(c) ADVISORY GUIDELINES- The Judicial Conference of the United States is authorized to promulgate advisory guidelines to which a presiding judge, in his or her discretion, may refer in making decisions with respect to the management and administration of photographing, recording, broadcasting, or televising described in subsections (a) and (b).

SEC. 2. DEFINITIONS.

As used in this Act:

(1) PRESIDING JUDGE- The term `presiding judge' means the judge presiding over the court proceeding concerned. In proceedings in which more than one judge participates, the presiding judge shall be the senior active judge so participating or, in the case of a circuit court of appeals, the senior active circuit judge so participating, except that--

(A) in en banc sittings of any United States circuit court of appeals, the presiding judge shall be the chief judge of the circuit whenever the chief judge participates; and

(B) in en banc sittings of the Supreme Court of the United States, the presiding judge shall be the Chief Justice whenever the Chief Justice participates.

(2) APPELLATE COURT OF THE UNITED STATES- The term `appellate court of the United States' means any United States circuit court of appeals and the Supreme Court of the United States.

SEC. 3. SUNSET.

The authority under section (1)(b) shall terminate on the date that is 3 years after the date of the enactment of this Act.

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To allow media coverage of court proceedings. (Introduced in the House)

HR 1281 IH

106th CONGRESS

1st Session

H. R. 1281

To allow media coverage of court proceedings.

IN THE HOUSE OF REPRESENTATIVES

March 25, 1999

Mr. CHABOT (for himself, Mr. DELAHUNT, Mr. DELAY, Mrs. MCCARTHY of New York, Mr. WEXLER, Mr. HILL of Montana, Mr. BLAGOJEVICH, Mr. GEKAS, Mr. SCARBOROUGH, Mr. JONES of North Carolina, Mr. HILLEARY, Mr. PORTMAN, Mr. DIXON, Mr. BARTLETT of Maryland, Mr. GIBBONS, Mr. COBLE, Mr. ROTHMAN, Mr. GRAHAM, Mr. SALMON, Mr. ENGLISH, Mr. GONZALEZ, Mrs. MORELLA, Mr. HULSHOF, Mrs. CHENOWETH, Mr. WEINER, Mr. BAKER, Mr. MEEHAN, Mr. TIERNEY, Mr. RAHALL, Mr. BRYANT, Mr. BORSKI, Mr. HEFLEY, Mr. TRAFICANT, Mr. BOEHNER, Mr. HAYES, Mr. MCCOLLUM, and Mr. ROGAN) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To allow media coverage of court proceedings.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION. 1. AUTHORITY OF PRESIDING JUDGE TO ALLOW MEDIA

COVERAGE OF COURT PROCEEDINGS.

(a) AUTHORITY OF APPELLATE COURTS- Notwithstanding any other provision of law, the presiding judge of an appellate court of the United States may, in his or her discretion, permit the photographing, electronic recording, broadcasting, or televising to the public of court proceedings over which that judge presides.

(b) AUTHORITY OF DISTRICT COURTS-

(1) IN GENERAL- Notwithstanding any other provision of law, any presiding judge of a district court of the United States may, in his or her discretion, permit the photographing, electronic recording, broadcasting, or televising to the public of court proceedings over which that judge presides.

(2) OBSCURING OF WITNESSES- (A) Upon the request of any witness in a trial proceeding other than a party, the court shall order the face and voice of the witness to be disguised or otherwise obscured in such manner as to render the witness unrecognizable to the broadcast audience of the trial proceeding.

(B) The presiding judge in a trial proceeding shall inform each witness who is not a party that the witness has the right to request that his or her image and voice be obscured during the witness' testimony.

(c) ADVISORY GUIDELINES- The Judicial Conference of the United States is authorized to promulgate advisory guidelines to which a presiding judge, in his or her discretion, may refer in making decisions with respect to the management and administration of photographing, recording, broadcasting, or televising described in subsections (a) and (b).

SEC. 2. DEFINITIONS.

As used in this Act:

(1) PRESIDING JUDGE- The term `presiding judge' means the judge presiding over the court proceeding concerned. In proceedings in which more than one judge participates, the presiding judge shall be the senior active judge so participating or, in the case of a circuit court of appeals, the senior active circuit judge so participating, except that--

(A) in en banc sittings of any United States circuit court of appeals, the presiding judge shall be the chief judge of the circuit whenever the chief judge participates; and

(B) in en banc sittings of the Supreme Court of the United States, the presiding judge shall be the Chief Justice whenever the Chief Justice participates.

(2) APPELLATE COURT OF THE UNITED STATES- The term `appellate court of the United States' means any United States circuit court of appeals and the Supreme Court of the United States.

SEC. 3. SUNSET.

The authority under section 1(b) shall terminate on the date that is 3 years after the date of the enactment of this Act.

II

106TH CONGRESS
1ST SESSION

S. 934

To enhance rights and protections for victims of crime.

IN THE SENATE OF THE UNITED STATES

APRIL 30, 1999

Mr. LEAHY (for himself, Mr. KENNEDY, Mr. SARBANES, Mr. KERRY, Mr. HARKIN, and Mrs. MURRAY) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To enhance rights and protections for victims of crime.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Crime Victims Assistance Act".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

SEC. 2. DEFINITIONS.

In this Act—

(1) the term "Attorney General" means the Attorney General of the United States;

(2) the term "bodily injury" has the meaning given that term in section 1365(g) of title 18, United States Code;

Subtitle B—Amendments to Federal Rules of Criminal Procedure

SEC. 121. RIGHT TO BE NOTIFIED OF PLEA AGREEMENT AND TO BE HEARD ON MERITS OF THE PLEA AGREEMENT.

(a) IN GENERAL.—Rule 11 of the Federal Rules of Criminal Procedure is amended by adding at the end the following:

"(i) RIGHTS OF VICTIMS.—

"(1) IN GENERAL.—In any case involving a defendant who is charged with an offense involving death or bodily injury to any person, a threat of death or bodily injury to any person, a sexual assault, or an attempted sexual assault—

"(A) the Government, prior to a hearing at which a plea of guilty or nolo contendere is entered, shall make a reasonable effort to notify the victim of—

"(i) the date and time of the hearing; and

"(ii) the right of the victim to attend the hearing and to address the court; and

"(B) if the victim attends a hearing described in subparagraph (A), the court, before

accepting a plea of guilty or nolo contendere, shall afford the victim an opportunity to be heard on the proposed plea agreement.

"(2) DEFINITION OF VICTIM.—In this subsection, the term 'victim' means any individual against whom an offense involving death or bodily injury to any person, a threat of death or bodily injury to any person, a sexual assault, or an attempted sexual assault, has been committed and also includes the parent or legal guardian of a victim who is less than 18 years of age, or incompetent, or 1 or more family members designated by the court if the victim is deceased or incapacitated.

"(4) MASS VICTIM CASES.—In any case involving more than 15 victims, the court, after consultation with the Government and the victims, may appoint a number of victims to serve as representatives of the victims' interests.".

(b) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendment made by subsection (a) shall become effective as provided in paragraph (3).

(2) ACTION BY JUDICIAL CONFERENCE.—

(A) RECOMMENDATIONS.—Not later than 180 days after the date of enactment of this

Act, the Judicial Conference shall submit to Congress a report containing recommendations for amending the Federal Rules of Criminal Procedure to provide enhanced opportunities for victims of offenses involving death or bodily injury to any person, the threat of death or bodily injury to any person, a sexual assault, or an attempted sexual assault, to be heard on the issue of whether or not the court should accept a plea of guilty or nolo contendere.

(B) INAPPLICABILITY OF OTHER LAW.—Chapter 131 of title 28, United States Code, does not apply to any recommendation made by the Judicial Conference under this paragraph.

(3) CONGRESSIONAL ACTION.—Except as otherwise provided by law, if the Judicial Conference—

(A) submits a report in accordance with paragraph (2) containing recommendations described in that paragraph, and those recommendations are the same as the amendment made by subsection (a), then the amendment made by subsection (a) shall become effective 30 days after the date on which the recommendations are submitted to Congress under paragraph (2);

(B) submits a report in accordance with paragraph (2) containing recommendations described in that paragraph, and those recommendations are different in any respect from the amendment made by subsection (a), the recommendations made pursuant to paragraph (2) shall become effective 180 days after the date on which the recommendations are submitted to Congress under paragraph (2), unless an Act of Congress is passed overturning the recommendations; and

(C) fails to comply with paragraph (2), the amendment made by subsection (a) shall become effective 360 days after the date of enactment of this Act.

(4) APPLICATION.—Any amendment made pursuant to this section (including any amendment made pursuant to the recommendations of the United States Sentencing Commission under paragraph (2)) shall apply in any proceeding commenced on or after the effective date of the amendment.

SEC. 122. ENHANCED RIGHTS OF NOTIFICATION AND ALLOCUTION AT SENTENCING.

(a) IN GENERAL.—Rule 32 of the Federal Rules of Criminal Procedure is amended—

(1) in subsection (b)—

(A) in paragraph (4), by striking subparagraph (D) and inserting the following:

"(D) a victim impact statement, identifying, to the maximum extent practicable—

"(i) each victim of the offense (except that such identification shall not include information relating to any telephone number, place of employment, or residential address of any victim);

"(ii) an itemized account of any economic loss suffered by each victim as a result of the offense;

"(iii) any physical injury suffered by each victim as a result of the offense, along with its seriousness and permanence;

"(iv) a description of any change in the personal welfare or familial relationships of each victim as a result of the offense; and

"(v) a description of the impact of the offense upon each victim and the recommendation of each victim regarding an appropriate sanction for the defendant;"; and

(B) by adding at the end the following:

"(7) VICTIM IMPACT STATEMENTS.—

"(A) IN GENERAL.—Any probation officer preparing a presentence report shall—

"(i) make a reasonable effort to notify each victim of the offense that such a report is being prepared and the purpose of such report; and

"(ii) provide the victim with an opportunity to submit an oral or written statement, or a statement on audio or videotape outlining the impact of the offense upon the victim.

"(B) USE OF STATEMENTS.—Any written statement submitted by a victim under subparagraph (A) shall be attached to the presentence report and shall be provided to the sentencing court and to the parties.";

(2) in subsection (c)(1), by adding at the end the following: "Before sentencing in any case in which a defendant has been charged with or found guilty of an offense involving death or bodily injury to any person, a threat of death or bodily injury to any person, a sexual assault, or an attempted sexual assault, the Government shall make a reasonable ef-

fort to notify the victim (or the family of a victim who is deceased) of the time and place of sentencing and of their right to attend and to be heard."; and

(3) in subsection (f), by inserting "the right to notification and to submit a statement under subdivision (b)(7), the right to notification and to be heard under subdivision (c)(1), and" before "the right of allocution".

(b) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendments made by subsection (a) shall become effective as provided in paragraph (3).

(2) ACTION BY JUDICIAL CONFERENCE.—

(A) RECOMMENDATIONS.—Not later than 180 days after the date of enactment of this Act, the Judicial Conference shall submit to Congress a report containing recommendations for amending the Federal Rules of Criminal Procedure to provide enhanced opportunities for victims of offenses involving death or bodily injury to any person, the threat of death or bodily injury to any person, a sexual assault, or an attempted sexual assault, to participate during the presentencing phase of the criminal process.

(B) INAPPLICABILITY OF OTHER LAW.—Chapter 131 of title 28, United States Code, does not apply to any recommendation made by the Judicial Conference under this paragraph.

(3) CONGRESSIONAL ACTION.—Except as otherwise provided by law, if the Judicial Conference—

(A) submits a report in accordance with paragraph (2) containing recommendations described in that paragraph, and those recommendations are the same as the amendments made by subsection (a), then the amendments made by subsection (a) shall become effective 30 days after the date on which the recommendations are submitted to Congress under paragraph (2);

(B) submits a report in accordance with paragraph (2) containing recommendations described in that paragraph, and those recommendations are different in any respect from the amendments made by subsection (a), the recommendations made pursuant to paragraph (2) shall become effective 180 days after the date on which the recommendations are submitted to Congress under paragraph (2), unless

an Act of Congress is passed overturning the recommendations; and

(C) fails to comply with paragraph (2), the amendments made by subsection (a) shall become effective 360 days after the date of enactment of this Act.

(4) APPLICATION.—Any amendment made pursuant to this section (including any amendment made pursuant to the recommendations of the United States Sentencing Commission under paragraph (2)) shall apply in any proceeding commenced on or after the effective date of the amendment.

SEC. 123. RIGHTS OF NOTIFICATION AND ALLOCUTION AT A PROBATION REVOCATION HEARING.

(a) IN GENERAL.—Rule 32.1 of the Federal Rules of Criminal Procedure is amended by adding at the end the following:

"(d) RIGHTS OF VICTIMS.—

"(1) IN GENERAL.—At any hearing pursuant to subsection (a)(2) involving one or more persons who have been convicted of an offense involving death or bodily injury to any person, a threat of death or bodily injury to any person, a sexual assault, or an attempted sexual assault, the Government shall make reasonable effort to notify the victim of the of-

fense (and the victim of any new charges giving rise to the hearings), of—

"(A) the date and time of the hearing; and

"(B) the right of the victim to attend the hearing and to address the court regarding whether the terms or conditions of probation or supervised release should be modified.

"(2) DUTIES OF COURT AT HEARING.—At any hearing described in paragraph (1) at which a victim is present, the court shall—

"(A) address each victim personally; and

"(B) afford the victim an opportunity to be heard on the proposed terms or conditions of probation or supervised release.

"(3) DEFINITION OF VICTIM.—In this rule, the term 'victim' means any individual against whom an offense involving death or bodily injury to any person, a threat of death or bodily injury to any person, a sexual assault, or an attempted sexual assault, has been committed and a hearing pursuant to subsection (a)(2) is conducted, including—

"(A) a parent or legal guardian of the victim, if the victim is less than 18 years of age or is incompetent; or

"(B) 1 or more family members or relatives of the victim designated by the court, if the victim is deceased or incapacitated.".

(b) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendment made by subsection (a) shall become effective as provided in paragraph (3).

(2) ACTION BY JUDICIAL CONFERENCE.—

(A) RECOMMENDATIONS.—Not later than 180 days after the date of enactment of this Act, the Judicial Conference shall submit to Congress a report containing recommendations for amending the Federal Rules of Criminal Procedure to ensure that reasonable efforts are made to notify victims of offenses involving death or bodily injury to any person, or the threat of death or bodily injury to any person, of any revocation hearing held pursuant to rule 32.1(a)(2) of the Federal Rules of Criminal Procedure.

(B) INAPPLICABILITY OF OTHER LAW.—Chapter 131 of title 28, United States Code, does not apply to any recommendation made by the Judicial Conference under this paragraph.

(3) CONGRESSIONAL ACTION.—Except as otherwise provided by law, if the Judicial Conference—

(A) submits a report in accordance with paragraph (2) containing recommendations described in that paragraph, and those recommendations are the same as the amendment made by subsection (a), then the amendment made by subsection (a) shall become effective 30 days after the date on which the recommendations are submitted to Congress under paragraph (2);

(B) submits a report in accordance with paragraph (2) containing recommendations described in that paragraph, and those recommendations are different in any respect from the amendment made by subsection (a), the recommendations made pursuant to paragraph (2) shall become effective 180 days after the date on which the recommendations are submitted to Congress under paragraph (2), unless an Act of Congress is passed overturning the recommendations; and

(C) fails to comply with paragraph (2), the amendment made by subsection (a) shall be-

come effective 360 days after the date of enactment of this Act.

(4) APPLICATION.—Any amendment made pursuant to this section (including any amendment made pursuant to the recommendations of the United States Sentencing Commission under paragraph (2)) shall apply in any proceeding commenced on or after the effective date of the amendment.

Subtitle C—Amendment to Federal Rules of Evidence

SEC. 131. ENHANCED RIGHT TO BE PRESENT AT TRIAL.

(a) IN GENERAL.—Rule 615 of the Federal Rules of Evidence is amended—

(1) by striking "At the request" and inserting the following:

"(a) IN GENERAL.—Except as provided in subsection (b), at the request";

(2) by striking "This rule" and inserting the following:

"(b) EXCEPTIONS.—Subsection (a)";

(3) by striking "exclusion of (1) a party" and inserting the following: "exclusion of—

"(1) a party";

(4) by striking "person, or (2) an officer" and inserting the following: "person;

106TH CONGRESS
1ST SESSION

H. J. RES. 64

Proposing an amendment to the Constitution of the United States to protect the rights of crime victims.

IN THE HOUSE OF REPRESENTATIVES

AUGUST 4, 1999

Mr. CHABOT (for himself, Ms. ROS-LEHTINEN, Mr. SALMON, Mr. BARCIA, Mr. SESSIONS, Mr. BRADY of Texas, Ms. PRYCE of Ohio, Mr. LOBIONDO, Mrs. BONO, Mr. SHADEGG, Mr. SMITH of New Jersey, Mr. HORN, Mr. CUNNINGHAM, Mr. GREEN of Wisconsin, Mr. LATOURETTE, Mr. LAHOOD, Ms. GRANGER, Mr. GALLEGLY, Mr. GEKAS, Mr. DELAY, Mr. YOUNG of Alaska, Mr. MORAN of Virginia, Mr. FOLEY, and Mrs. MYRICK) introduced the following joint resolution; which was referred to the Committee on the Judiciary

---

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States to protect the rights of crime victims.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several

States within seven years after the date of its submission for ratification:

"ARTICLE—

"SECTION 1. Each individual who is a victim of a crime for which the defendant can be imprisoned for a period longer than one year or any other crime that involves violence shall have the rights—

"to reasonable notice of, and not to be excluded from, any public proceedings relating to the crime;

"to be heard, if present, and to submit a statement at all such proceedings to determine a conditional release from custody, an acceptance of a negotiated plea, or a sentence;

"to reasonable notice of and an opportunity to submit a statement concerning any proposed pardon or commutation of a sentence;

"to the foregoing rights at a parole proceeding that is not public, to the extent those rights are afforded to the convicted offender;

"to reasonable notice of a release or escape from custody relating to the crime;

"to consideration of the interest of the victim that any trial be free from unreasonable delay;

"to an order of restitution from the convicted offender;

"to consideration for the safety of the victim in determining any conditional release from custody relating to the crime; and

"to reasonable notice of the rights established by this article.

"SECTION 2. Only the victim or the victim's lawful representative shall have standing to assert the rights established by this article. Nothing in this article shall provide grounds to stay or continue any trial, reopen any proceeding or invalidate any ruling, except with respect to conditional release or restitution or to provide rights guaranteed by this article in future proceedings, without staying or continuing a trial. Nothing in this article shall give rise to or authorize the creation of a claim for damages against the United States, a State, a political subdivision, or a public officer or employee.

"SECTION 3. The Congress shall have the power to enforce this article by appropriate legislation. Exceptions to the rights established by this article may be created only when necessary to achieve a compelling interest.

"SECTION 4. This article shall take effect on the 180th day after the ratification of this article. The right to an order of restitution established by this article shall not apply to crimes committed before the effective date of this article.

"SECTION 5. The rights and immunities established by this article shall apply in Federal and State proceedings, including military proceedings to the extent Congress may provide by law, juvenile justice proceedings and proceedings in the District of Columbia and any commonwealth, territory, or possession of the United States.".

○

Author: John Rabiej at ao-1po
Date: 5/11/99 9:45 AM
Priority: Normal
TO: Michael Blommer, Arthur White, Dan Cunningham
CC: Peter McCabe, Mark Shapiro
Subject: Omnibus Crime Bill

The "21st Century Justice Act of 1999" (S. 899) contains multiple provisions that are inconsistent with the Rules Enabling Act. Many of the provisions had been introduced in earlier congressional sessions, and we have a record of written objections.

We have concerns regarding the following provisions:

Sections 5103-5108 -- provide victims of crime with allocution rights -- Criminal Rule 11 is directly amended by section 5106

Section 5224 -- directly amends Evidence Rule 404(b) to permit consideration of evidence showing the disposition of a defendant

Section 6515 -- directly amends Criminal Rule 43(c) to permit videoconferencing of certain proceedings, including sentencing proceedings

Section 6703 -- directly amends Criminal Rule 43 governing a criterion for forfeiting bail bond

Section 7101 -- directly amends Criminal Rule 24 to equalize the number of peremptory challenges

Section 7102 -- directly amends Criminal Rule 23 to permit a jury of 6 in a criminal case

Section 7103 -- directly amends Evidence Rule 404 to permit consideration of a defendant's pertinent trait

Section 7105 -- amends the Rules Enabling Act and would restructure the composition of the rules committees

Section 7321-- sets up ethical standards for prosecutors

Section 7477 -- permits discosure of grand jury material to government attorneys not involved in the original prosecution

I presume that the bill, as an entirety, has little chance of success. But parts of it will certainly be cut out and acted upon separately. I propose do nothing at this time, but to await events. I believe we have written letters on most of these provisions that can be dusted off and sent on short notice.

John

II

106TH CONGRESS
1ST SESSION

S. 899

To reduce crime and protect the public in the 21st Century by strengthening Federal assistance to State and local law enforcement, combating illegal drugs and preventing drug use, attacking the criminal use of guns, promoting accountability and rehabilitation of juvenile criminals, protecting the rights of victims in the criminal justice system, and improving criminal justice rules and procedures, and for other purposes.

IN THE SENATE OF THE UNITED STATES

APRIL 28, 1999

Mr. HATCH (for himself, Mr. THURMOND, Mr. SPECTER, Mr. DEWINE, Mr. ASHCROFT, Mr. ABRAHAM, Mr. SESSIONS, and Mr. GRAMS) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To reduce crime and protect the public in the 21st Century by strengthening Federal assistance to State and local law enforcement, combating illegal drugs and preventing drug use, attacking the criminal use of guns, promoting accountability and rehabilitation of juvenile criminals, protecting the rights of victims in the criminal justice system, and improving criminal justice rules and procedures, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) IN GENERAL.—This Act may be cited as the "21st Century Justice Act of 1999".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

SEC. 2. SEVERABILITY.

If any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provisions of such to any person or circumstance shall not be affected thereby.

TITLE I—NEW MILLENNIUM LAW ENFORCEMENT ASSISTANCE

SEC. 1001. SHORT TITLE.

This title may be cited as the "New Millennium Law Enforcement Assistance Act".

TITLE V—PROTECTING VICTIMS OF CRIME

Subtitle A—Victims Rights

SEC. 5001. SHORT TITLE.

This subtitle may be cited as the "Victims Rights Act of 1999".

CHAPTER 1—GENERAL REFORMS

SEC. 5101. VICTIM ALLOCUTION IN PRETRIAL DETENTION PROCEEDINGS.

(a) PENDING TRIAL.—Section 3141(a) of title 18, United States Code, is amended by striking "A judicial" and inserting "After considering all relevant information, including the views of the victims, a judicial".

(b) DETENTION HEARING.—Section 3142(f) of title 18, United States Code, is amended by inserting before "The facts the judicial officer uses" the following: "Each victim of the offense, if present in person or through counsel, shall be afforded an opportunity to address the court on the issue of detention, either in person or through counsel. A victim who, at the time of the hearing under this subsection, is incarcerated in any Federal, State, or local correctional or detention facility, shall not have the right to appear in person, but shall be afforded a reasonable opportunity to present views by alternate means.".

(c) FACTORS TO BE CONSIDERED.—Section 3142(g) of title 18, United States Code, is amended—

(1) in paragraph (3), by striking "and" at the end;

(2) by redesignating paragraph (4) as paragraph (5); and

(3) by inserting after paragraph (3) the following:

"(4) the views of the victim; and".

(d) RIGHT TO BE NOTIFIED OF DETENTION HEARING AND RIGHT TO BE HEARD ON THE ISSUE OF DETENTION.—Section 3142 of title 18, United States Code, is amended by adding at the end the following:

"(k) NOTIFICATION OF RIGHT TO BE HEARD.—

"(1) IN GENERAL.—Prior to any detention hearing scheduled pursuant to subsection (f)—

"(A) the Government shall make a reasonable effort to notify the victim of the hearing, and of the right of the victim to be heard on the issue of detention; and

"(B) at the hearing under subsection (f), the court shall inquire of the Government as to whether the efforts at notification of the victim under subparagraph (A) were successful and, if so, whether the victim wishes to be heard on

the issue of detention and, if so, shall afford the victim such an opportunity.

"(2) LIMITATION.—Upon motion of either party that identification of the defendant by the victim is a fact in dispute, and that no means of verification has been attempted, the Court shall use appropriate measures to protect the integrity of the identification process.

"(3) VICTIM CONTACT INFORMATION.—With respect to any case described in paragraph (1), the victim shall notify the appropriate authority of an address or other means of contact by which notification under this subsection may be made. The confidentiality of any information relating to a victim shall be maintained.".

SEC. 5102. VICTIM DEFINED.

Section 3156(a) of title 18, United States Code, is amended—

(1) in paragraph (4), by striking "and" at the end;

(2) in paragraph (5), by striking the period at the end and inserting "; and"; and

(3) by adding at the end the following:

"(6) the term 'victim'—

"(A) means an individual harmed—

"(i) as a result of a commission of an offense involving death or bodily injury to any person, a sexual assault, or an attempted sexual assault; or

"(ii) by any fraud or misrepresentation relating to a sale or other tract for any item, benefit, product, or service; and

"(B) includes—

"(i) in the case of a victim who is less than 18 years of age or incompetent, the parent or legal guardian of the victim;

"(ii) in the case of a victim who is deceased or incapacitated, 1 or more family members designated by the court; and

"(iii) any other person appointed by the court to represent the victim, except that in no event shall a defendant be appointed as the representative or guardian of the victim.".

SEC. 5103. RIGHT OF VICTIM TO SPEEDY TRIAL.

Section 3161(h)(8)(B) of title 18, United States Code, is amended by adding at the end the following:

"(v) The interests of the victim (or the family of a victim who is deceased or incapaci-

tated) in the prompt and appropriate disposition of the case, free from unreasonable delay.".

SEC. 5104. RIGHT OF VICTIM TO JUST SENTENCE.

(a) IN GENERAL.—Section 3553 of title 18, United States Code, is amended—

(1) in subsection (a)—

(A) by redesignating paragraphs (6) and (7) as paragraphs (7) and (8), respectively; and

(B) by inserting after paragraph (5) the following:

"(6) the views of the victim if such views are presented to the court;";

(2) by redesignating subsections (b) through (f) as subsections (c) through (g), respectively; and

(3) by inserting after subsection (a) the following:

"(b) VICTIM'S RIGHT TO ATTENDANCE AND ALLOCUTION AT SENTENCING.—

"(1) VICTIM DEFINED.—In this subsection, the term 'victim' has the meaning given the term in section 3156.

"(2) RIGHT TO ATTENDANCE.—

"(A) IN GENERAL.—Subject to subparagraph (B), each victim of an offense shall have the right to be present at the sentencing pro-

ceedings of a defendant convicted of the offense conducted pursuant to this chapter or chapter 228.

"(B) INCARCERATED VICTIMS.—A victim who, at the time that the sentencing proceedings of a defendant are conducted, is incarcerated in any Federal, State, or local correctional or detention facility, shall not have the right to appear in person at sentencing proceedings of a defendant, but shall be afforded a reasonable opportunity to present views by alternate means.

"(3) RIGHT TO ADDRESS COURT.—

"(A) IN GENERAL.—Subject to subparagraph (B), before the imposition of sentence under this chapter, each victim of the offense, if present in person or through counsel, shall be afforded an opportunity to address the court on the issue of sentencing, including the presentation of—

"(i) information relating to the extent and scope of the injury or loss suffered by the victim or the family of the victim as a result of the offense;

"(ii) information relating to the impact of the offense on the victim or the family of the victim; and

"(iii) recommendations regarding an appropriate sentence for the defendant, except that nothing in this clause may be construed to authorize the imposition of a sentence not otherwise authorized by law.

"(B) LIMITATIONS.—The court may reasonably limit the number of victims permitted to address the court personally or through counsel under this paragraph, if the court finds, from facts on the record, that the number of victims is so large that affording each victim an opportunity to address the court would—

"(i) amount to cumulative victim impact information; and

"(ii) prolong the sentencing process to the degree that the need to permit each victim an opportunity to address the court is substantially outweighed by the burden on the sentencing process.

"(4) SUBMISSION OF WRITTEN STATEMENT.—A victim, whether or not present in person or through counsel at a sentencing proceeding, may provide the

court a written statement, which may include any information or recommendations described in paragraph (2)(A), in addition to or in lieu of addressing the court under that paragraph. A victim not permitted to address the court under paragraph (2)(B) shall have the right to provide a written statement under this paragraph.

"(5) FAILURE TO ATTEND TRIAL.—The attendance of the victim at all or part of, or testimony during, the trial of the defendant shall not be construed to prevent a victim from exercising the right to attend sentencing or address the court or to otherwise present to the court information pursuant to this subsection.

"(6) TESTIMONY.—No oral statement made or written statement submitted under this subsection shall be considered to be testimony under any other provision of law.

"(7) NOTICE.—The court shall provide reasonable notice to each victim of the right to attend and address the court or otherwise present to the court information pursuant to this subsection, including notice of the scheduled date, time, and place of the sentencing hearing. Notice under this paragraph

may be consolidated with the notice under section 3664(d)(2).

(b) HEARING BEFORE A COURT OR JURY.—Section 3593(b) of title 18, United States Code, is amended by adding at the end the following: "The provisions of section 3553(b), relating to attendance and allocation by victims, shall apply to hearings under this subsection.".

(c) RULES OF CRIMINAL PROCEDURE.—Pursuant to chapter 131 title 28, United States Code, the Supreme Court may prescribe amendments to rules of criminal procedure, consistent with this section and the amendments made by this section.

SEC. 5105. RIGHT OF VICTIM TO NOTICE OF RELEASE OR ESCAPE.

(a) IN GENERAL.—Section 3621(a) of title 18, United States Code, is amended by adding at the end the following: "Notice of commitment shall be provided to each victim of the offense for which the person is committed under this subsection.".

(b) NOTICE OF INCARCERATION OR RELEASE.—

(1) IN GENERAL.—Chapter 229 of title 18, United States Code, is amended by adding at the end the following:

"§ 3627. Notice to victims of incarceration or release of defendants

"(a) IN GENERAL.—The Bureau of Prisons shall ensure that reasonable notice is provided to each victim of an offense for which a person is imprisoned pursuant to this subchapter—

"(1) not less than 30 days before such the release of that person under section 3624, assignment of that person to pre-release custody section 3624(c), or transfer of that person under section 3623;

"(2) not less than 10 days before the temporary release of that person under section 3622;

"(3) not less than 12 hours after discovery that such person has escaped;

"(4) not less than 12 hours after the return to custody of such person after an escape; and

"(5) at such other times as is reasonable before any other form of release of that person as may occur.

"(b) APPLICABILITY.—This section applies to any escape, work release, furlough, or any other form of release from a psychiatric institution or other facility that provides mental or other health services to persons in the custody of the Bureau of Prisons.

"(c) VICTIM CONTACT INFORMATION.—It shall be the responsibility of a victim to notify the Bureau of Prisons, by means of a form to be provided by the Attorney General, of any change in the mailing address of the victim, or other means of contacting the victim, while the defendant is subject to imprisonment. The Bureau of Prisons shall ensure the confidentiality of any information relating to a victim.".

(2) TECHNICAL AND CONFORMING AMENDMENT.—The analysis for chapter 229 of title 18, United States Code, is amended by adding at the end the following:

"3627. Notice to victims of incarceration or release of defendants.".

SEC. 5106. RIGHTS OF VICTIMS IN PLEA AGREEMENTS.

(a) IN GENERAL.—Rule 11 of the Federal Rules of Criminal Procedure is amended—

(1) in subdivision (c)—

(A) in paragraph (1), by striking the last sentence and inserting the following: "To the extent practicable, and subject to the provisions of subdivision (i)(3), the attorney for the government shall consult with the victims of all offenses chargeable to the defendant regarding any agreement with the defendant. The attorney for the government may impose, and request the court to enforce, such confidentiality

requirements on the victim relating to discussions under this paragraph as the attorney for the government deems appropriate. Except as provided by subdivision (i)(4), the court shall not participate in any discussions under this paragraph."; and

(B) in paragraph (2), by adding at the end the following: "In determining whether to accept or reject the agreement, the court shall consider the views of the victim provided pursuant to subdivision (i), giving to such views weight as the court determines to be appropriate."; and

(2) by adding at the end the following:

"(i) RIGHTS OF VICTIMS.—

"(1) VICTIM DEFINED.—In this rule, the term 'victim' has the meaning given the term in section 3156 of title 18, United States Code.

"(2) NOTIFICATION OF PLEA AGREEMENT HEARINGS.—The Government, before a hearing at which a plea of guilty or nolo contendere is entered, shall, except as provided in paragraph (4), make reasonable efforts to notify the victim of—

"(A) the date and time of the hearing;

"(B) the elements of the proposed plea or plea agreement; and

"(C) the right of the victim to attend the hearing, and, if present, to address the court personally or through counsel on the views of the victim on the proposed plea or plea agreement.

"(3) OPPORTUNITY TO BE HEARD ON PLEA AGREEMENT.—If the victim attends a hearing described in paragraph (2), the court, before accepting a plea of guilty or nolo contendere, shall afford the victim, either personally or through counsel, an opportunity to be heard on the proposed plea or plea agreement.

"(4) WRITTEN STATEMENT.—A victim, whether or not present in person or through counsel, may provide the court a written statement of the views of the victims regarding a proposed plea or plea agreement in addition to or in lieu of addressing the court.

"(5) EXCEPTIONS.—Notwithstanding any other provision of this subdivision—

"(A) in any case in which a victim is a defendant in the same or related case, or in which the Government certifies to the court under seal

that affording such victim any right provided under this rule will jeopardize an ongoing investigation, the victim shall not have such right;

"(B) a victim who, at the time of discussions under subdivision (e) or a hearing under this subdivision, is incarcerated in any Federal, State, or local correctional or detention facility, shall not have the right to appear in person, but, subject to subparagraph (A), shall be afforded a reasonable opportunity to present views or participate by alternative means; and

"(C) in any case involving more than 15 victims, the court, after consultation with the Government and the victims, may appoint a number of victims to represent the interests of the victims, except that all victims shall retain the right to submit a written statement under paragraph (4).

"(6) VICTIM CONTACT INFORMATION.—It shall be the responsibility of a victim to notify the attorney for the government of an address or other sufficient means by which a notification required by this subsection may be made. The attorney for the government shall ensure the confidentiality of any information relating to a victim.".

(b) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendment made by subsection (a) shall become effective as provided in paragraph (3).

(2) ACTION BY JUDICIAL CONFERENCE.—

(A) RECOMMENDATIONS.—Not later than 180 days after the date of enactment of this Act, the Judicial Conference of the United States shall submit to Congress a report containing recommendations for amending the Federal Rules of Criminal Procedure to provide enhanced opportunities for victims—

(i) to be consulted by the attorney for the government during plea negotiations;

(ii) to provide to the court views on the issue of whether or not the court should accept a plea of guilty or nolo contendere; and

(iii) to have such views considered by the court.

(B) INAPPLICABILITY OF OTHER LAW.—Chapter 131 of title 28, United States Code, does not apply to any recommendation made by the Judicial Conference of the United States under this paragraph.

(3) CONGRESSIONAL ACTION.—Except as otherwise provided by law, if the Judicial Conference of the United States—

(A) submits a report in accordance with paragraph (2) containing recommendations described in that paragraph, and those recommendations are the same as the amendment made by subsection (a), then the amendment made by subsection (a) shall become effective 30 days after the date on which the recommendations are submitted to Congress under paragraph (2);

(B) submits a report in accordance with paragraph (2) containing recommendations described in that paragraph, and those recommendations are different in any respect from the amendment made by subsection (a), the recommendations made pursuant to paragraph (2) shall become effective 180 days after the date on which the recommendations are submitted to Congress under paragraph (2), unless an Act of Congress is passed overturning the recommendations; and

(C) fails to comply with paragraph (2), the amendment made by subsection (a) shall be-

come effective 360 days after the date of enactment of this Act.

(4) APPLICATION.—Any amendment made pursuant to this section (including any amendment made pursuant to the recommendations of the Judicial Conference of the United States under paragraph (2)) shall apply in any proceeding commenced on or after the effective date of the amendment.

SEC. 5107. RIGHT OF VICTIM TO PARTICIPATE IN SENTENCE ADJUSTMENT HEARINGS.

(a) REVOCATION OF PROBATION.—Section 3564 of title 18, United States Code, is amended by adding at the end the following:

"(f) APPLICABILITY OF VICTIMS RIGHTS.—The provisions of section 3553(b) shall apply to proceedings under this section.".

(b) SUPERVISED RELEASE.—Section 3583 of title 18, United States Code, is amended—

(1) in subsection (c), by striking "and (a)(6)" and inserting "(a)(6), and (a)(7)"; and

(2) by adding at the end the following:

"(j) APPLICABILITY OF VICTIMS RIGHTS.—The provisions of section 3553(b) shall apply to proceedings under this section.".

(c) EFFECT OF DEFAULT.—Section 3613A(b)(1) of title 18, United States Code, is amended by adding at the end the following: "The provisions of section 3553(b) shall apply to any such hearing.".

(d) RESENTENCING UPON FAILURE TO PAY A FINE OR RESTITUTION.—Section 3614 of title 18, United States Code, is amended—

(1) by redesignating subsection (c) as subsection (d); and

(2) by inserting after subsection (b) the following:

"(c) APPLICABILITY OF VICTIMS RIGHTS.—The provisions of section 3553(b) shall apply to any proceeding under this section.".

SEC. 5108. ENHANCED RIGHT TO BE PRESENT AT TRIAL.

Section 3510 of title 18, United States Code, is amended—

(1) in subsection (a), by striking "make a statement" and all that follows before the period at the end and inserting "present information or otherwise participate in accordance with section 3553(b)";

(2) in subsection (b), by inserting before the period at the end following: ", or present information or otherwise participate in accordance with section 3553(b)";

(3) in subsection (c), by striking "includes" and all that follows before the period at the end and inserting "has the meaning given the term in section 3156"; and

(4) by adding at the end the following:

"(d) APPLICATION TO TELEVISED PROCEEDINGS.—This section applies to victims viewing proceedings pursuant to—

"(1) section 235 of the Antiterrorism and Effective Death Penalty Act of 1996; or

"(2) any rule issued pursuant to section 235(g) of the Antiterrorism and Effective Death Penalty Act of 1996.".

(b) PROHIBITION ON EXCLUSION.—Section 235 of the Antiterrorism and Effective Death Penalty Act of 1996 (42 U.S.C. 10608) is amended—

(1) in subsection (b)(2), by adding at the end the following: "The intention of a victim to present information or otherwise participate in a sentencing proceeding in accordance with sections 3553(b) or 3593 shall not be grounds to exclude a victim under this paragraph."; and

(2) in subsection (f)—

(A) by striking "As used in" and inserting "(1) STATE.—In"; and

(B) by adding at the end the following:

"(2) VICTIM.—In this section, the term 'victim' has the meaning given the term in section 3156 of title 18, United States Code.".

(c) Pursuant to chapter 131 of title 28, United States Code, the Supreme Court may issue rules, or amend existing rules, to conform to the requirements of this section.

(d) VICTIM AND WITNESS PROTECTION ACT.—Section 502 of the Victim and Witness Protection Act (42 U.S.C. 10606) is amended—

(1) in paragraph (4), by adding at the end the following: "For purposes of this paragraph, victim statements at sentencing, other information presented by or on behalf of a victim at sentencing, and other victim participation in accordance with section 3553(b) of title 18, United States Code, shall not be considered to be testimony."; and

(2) in paragraph (5), by striking "attorney" and inserting "the attorney".

SEC. 5109. PILOT PROGRAMS TO ESTABLISH OMBUDSMAN PROGRAMS FOR CRIME VICTIMS.

(a) DEFINITIONS.—In this section:

(1) DIRECTOR.—The term "Director" means the Director of the Office of Victims of Crime.

SEC. 5222. DEATH PENALTY FOR FATAL INTERSTATE DOMESTIC VIOLENCE OFFENSES.

Sections 2261(b)(1) and 2262(b)(1) of title 18, United States Code, are each amended by inserting "or may be sentenced to death," after "years,".

SEC. 5223. DEATH PENALTY FOR FATAL INTERSTATE VIOLATIONS OF PROTECTIVE ORDERS.

Section 2262 of title 18, United States Code, is amended by inserting "or may be sentenced to death," after "years,".

SEC. 5224. EVIDENCE OF DISPOSITION OF DEFENDANT TOWARD VICTIM IN DOMESTIC VIOLENCE CASES AND OTHER CASES.

Rule 404(b) of the Federal Rules of Evidence is amended by striking "or absence of mistake or accident" and inserting "absence of mistake or accident, or a disposition toward a particular individual,".

SEC. 5225. HIV TESTING OF DEFENDANTS IN SEXUAL ASSAULT CASES.

(a) IN GENERAL.—Chapter 109A of title 18, United States Code, is amended by adding at the end the following:

SEC. 6515. AUTHORIZATION OF VIDEO TELECONFERENCING FOR CERTAIN PROCEEDINGS.

Rule 43(c) of the Federal Rules of Criminal Procedure is amended—

(1) in paragraph (3) by striking "or" after the semicolon;

(2) in paragraph (4) by striking the period and inserting a semicolon and "or"; and

(3) by adding at the end the following:

"(5) when—

"(A) the proceeding is the initial appearance, arraignment, taking of the plea, other pretrial session, or the sentencing hearing; and

"(B)(i) the defendant, in writing, waives the right to be present in court; or

"(ii) the court finds, for good cause shown in exceptional circumstances and upon appropriate safeguards, that communication with a defendant (who is not physically present before the court) by video teleconferencing is an adequate substitute for the defendant's physical presence.".

SEC. 6702. REPORT ON FEDERAL DETENTION SPACE SHORTAGE.

(a) IN GENERAL.—Not later than 180 days after the date of enactment of this Act, the Attorney General shall submit to the Committees on the Judiciary of the Senate and the House of Representatives a report on detention space for Federal detainees in the custody of the United States Marshals Service and the Immigration and Naturalization Service.

(b) CONTENTS OF REPORT.—The report submitted under subsection (a) shall include—

(1) 10-year projections for the detainee populations of the United States Marshals Service and the Immigration and Naturalization Service;

(2) specific plans to ensure space is available to meet projected needs;

(3) specific plans to comply with detention and removal requirements of the Immigration Reform Act of 1996; and

(4) recommendations on the feasibility and advisability of consolidating all detention activities of the Department of Justice under 1 agency of the Department of Justice.

SEC. 6703. FAIRNESS IN BAIL BOND FORFEITURE.

Rule 46(e)(1) of the Federal Rules of Criminal Procedure is amended by striking "there is a breach of condition

of" and inserting "the defendant fails to appear as required by".

Subtitle H—Prison Litigation Reform

SEC. 6801. APPROPRIATE REMEDIES FOR PRISON CONDITIONS.

(a) TRANSFER AND REDESIGNATION.—Section 3626 of title 18, United States Code, is—

(1) transferred to the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997 et seq.);

(2) redesignated as section 13 of that Act; and

(3) inserted after section 12 of that Act (42 U.S.C. 1997j).

(b) AMENDMENTS.—Section 13 of the Civil Rights of Institutionalized Persons Act, as redesignated by subsection (a) of this section, is amended—

(1) in subsection (b)(3), by adding at the end the following: "Noncompliance with an order for prospective relief by any party, including the party seeking termination of that order, shall not constitute grounds for refusal to terminate the prospective relief, if the party's noncompliance does not constitute a current and ongoing violation of a Federal right.";

"(b) DEFINITIONS.—In this section—

"(1) the terms 'civil action with respect to prison conditions', 'prisoner', 'prisoner release order', and 'prison' have the meanings given those terms in section 13(h) of the Civil Rights of Institutionalized Persons Act; and

"(2) the term 'prison conditions' means conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The analysis for chapter 99 of title 28, United States Code, is amended by adding at the end the following:

"1632. Limitation on prisoner release orders.".

TITLE VII—CRIMINAL LAW AND PROCEDURAL IMPROVEMENTS

Subtitle A—Equal Protection for Victims

SEC. 7101. RIGHT OF VICTIM TO IMPARTIAL JURY.

Rule 24(b) of the Federal Rules of Criminal Procedure is amended by striking "the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges" and inserting "the government and the defendant (or defendants jointly) are each entitled to 10 peremptory challenges".

SEC. 7102. JURY TRIAL IMPROVEMENTS.

(a) JURIES OF 6.—

(1) IN GENERAL.—Rule 23(b) of the Federal Rules of Criminal Procedure is amended—

(A) by striking "JURY OF LESS THAN TWELVE. JURIES" and inserting the following:

"(b) NUMBER OF JURORS.—

"(1) IN GENERAL.—Except as provided in subsection (2), juries"; and

(B) by adding at the end the following:

"(2) JURIES OF 6.—Juries may be of 6 on request in writing by the defendant with the approval of the court and the consent of the government.".

(2) ALTERNATE JURORS.—Rule 24(c) of the Federal Rules of Criminal Procedure is amended—

(A) by striking "In a case" and inserting the following:

"(1) IN GENERAL.—In a case"; and

(B) by adding at the end the following:

"(2) JURIES OF 6.—In the case of a jury of 6, the court shall direct that not more than 3 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors.".

(b) CAPITAL CASES.—Section 3593(b) of title 18, United States Code, is amended—

(1) by redesignating paragraphs (1) and (2) as subparagraphs (A) and (B), respectively, and indenting appropriately;

(2) by redesignating subparagraphs (A) through (D) as clauses (i) through (iv), respectively, and indenting appropriately;

(3) in the first sentence, by striking "If the attorney" and inserting the following:

"(1) IN GENERAL.—If the attorney";

(4) in the second sentence, by striking "The hearing" and inserting the following:

"(2) TRIER OF FACT.—The hearing"; and

(5) by striking the last sentence and inserting the following:

"(3) JURY IMPANELLED FOR THE PURPOSE OF THE HEARING.—

"(A) IN GENERAL.—A jury impanelled under paragraph (2)(B) may be made of 6 on request in writing by the defendant with the approval of the court and the consent of the government.

"(B) NO REQUEST FOR JURY OF 6.—If a jury of 6 is not impanelled under subparagraph (A), the jury shall be made of 12, unless, at any time before the conclusion of the hearing, the

parties stipulate, with the approval of the court, that the jury shall consist of a lesser number.".

SEC. 7103. REJOINDER TO ATTACKS ON THE CHARACTER OF THE VICTIM BY ADMISSION OF EVIDENCE OF THE CHARACTER OF THE ACCUSED.

Rule 404(a)(1) of the Federal Rules of Evidence is amended by inserting before the semicolon at the end the following: ", or, if an accused offers evidence of a pertinent trait of character of the victim of the crime, evidence of a pertinent trait of character of the accused offered by the prosecution".

SEC. 7104. USE OF NOTICES OF RELEASE OF PRISONERS.

Section 4042(b) of title 18, United States Code, is amended by striking paragraph (4).

SEC. 7105. BALANCE IN THE COMPOSITION OF RULES COMMITTEES.

Section 2073 of title 28, United States Code, is amended—

(1) in subsection (a)(2), by adding at the end the following: "On each such committee that makes recommendations concerning rules that affect criminal cases (including recommendations relating to the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, the Federal Rules of Appellate Procedure, the Rules Governing Section 2254 Cases,

and the Rules Governing Section 2255 Cases), the number of members who represent or supervise the representation of defendants in the trial, direct review, or collateral review of criminal cases shall not exceed the number of members who represent or supervise the representation of the Government or a State in the trial, direct review, or collateral review of criminal cases."; and

(2) in subsection (b), by adding at the end the following: "The number of members of the standing committee who represent or supervise the representation of defendants in the trial, direct review, or collateral review of criminal cases shall not exceed the number of members who represent or supervise the representation of the Government or a State in the trial, direct review, or collateral review of criminal cases.".

Subtitle B—Reform of Judicially Created Exclusionary Rules

SEC. 7201. ENFORCEMENT OF CONFESSION REFORM STATUTE.

(a) IN GENERAL.—Section 3501(e) of title 18, United States Code, is amended—

(1) by striking "(e) As used in this section, the term" and inserting the following:

support of the notice made under subsection (a) to which such action relates.".

(2) CONFORMING AMENDMENT.—The analysis for that chapter is amended by adding at the end the following:

"2328. Blocking or termination of telephone service.".

SEC. 7477. GRAND JURY DISCLOSURE IN INVESTIGATIONS OF HEALTH CARE OFFENSES.

Section 3322 of title 18, United States Code, is amended—

(1) by redesignating subsections (c) and (d) as subsections (d) and (e), respectively; and

(2) by inserting after subsection (b) the following:

"(c) GRAND JURY DISCLOSURE.—Subject to section 3486(f), upon ex parte motion of an attorney for the government showing that such disclosure would be of assistance to enforce any provision of Federal law, a court may direct the disclosure of any matter occurring before a grand jury during an investigation of a Federal health care offense (as defined in section 24(a) of this title) to an attorney for the government to use in any investigation or civil proceeding relating to fraud or false claims in connection with a Federal health care program (as defined in section 1128B(f) of the Social Security Act (42 U.S.C. 1320a–7b(f))).".

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

September 15, 1999

MEMORANDUM TO ADVISORY COMMITTEE ON CRIMINAL RULES

SUBJECT: *Agenda Book for the October 7-8, 1999 Meeting in Williamsburg*

Attached is the agenda book for the October 7-8, 1999 Criminal Rules Committee meeting in Williamsburg. Also attached is an executive summary of a study completed by the National Center for State Courts on the states' use of videoconferencing in criminal proceedings. Please bring these materials with you to the meeting.

The meeting will be held at the Williamsburg Lodge and will start each day at 8:30 a.m. Dinner information for Thursday, October 7, has been sent to you by separate letter.

John K. Rabiej

Attachments

cc: Honorable Anthony J. Scirica
Professor Daniel R. Coquillette

LEONIDAS RALPH MECHAM
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JOHN K. RABIEJ
Chief
Rules Committee Support Office

September 15, 1999

MEMORANDUM TO ADVISORY COMMITTEE ON CRIMINAL RULES

SUBJECT: Videoconferencing

In accordance with Judge Roll's request, I am attaching an executive summary of a study completed by the National Center for State Courts on the states' use of videoconferencing in criminal proceedings. Although somewhat dated, the report shows a clear trend toward increasing use of the technology in state courts.

Judge Roll and his subcommittee were particularly interested in determining the rate of defendants' consents to the use of videoconferencing in lieu of actual presence in criminal pretrial proceedings. The National Center's study does not include this data. Our office is contacting the six state court systems identified in the report that require a defendant's waiver and will request information on the consent rates in both misdemeanor and felony cases. We will provide a report to Judge Roll's subcommittee before the October 7-8 committee meeting.

John K. Rabiej

Attachment

cc: Honorable Anthony J. Scirica

USE OF INTERACTIVE VIDEO FOR COURT PROCEEDINGS: LEGAL STATUS AND USE NATIONWIDE

Prepared for the NIC Jails Division by LIS, Inc.,
NIC Information Center Contractor
Longmont, Colorado

January 1995

This material was prepared by LIS, Inc., under contract J100C0017DQ9 with the U.S. Department of Justice, National Institute of Corrections.

Assessing the Status of Interactive Video

> *These rules shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice.*
> —Ohio Crim. R. 1(B)

Though it refers to broad criminal procedure rather than interactive video itself, the text of this Ohio statute expresses the aim of jurisdictions that have adopted interactive video to provide a linkage between the courts and jails. Interactive video involves two-way, televised coverage of both the court and the defendant and allows the judge and the defendant to converse directly, "face to face," though separated by city blocks or rural miles. The use of interactive video for arraignments, bond hearings, and other proceedings is viewed by many agencies as a cost-effective alternative for providing arrestees/defendants with access to the courts.

Scope of the project. This research was undertaken for two purposes. The first was to briefly examine the legal status of interactive video technology as a means of providing a live linkage between arrestees/defendants in jails with the courts. A number of principles affect whether and how a video linkage can be used. These include, for example, Constitutional and statutory requirements for the personal appearance of the defendant in court and for access to private counsel; evidentiary and procedural restrictions, which often depend on the type of proceeding; requirements for original signatures on case documents; judges' discretion; and defendant preference.

The secondary intent of the project was to identify jurisdictions that are now using interactive video technology or are developing new systems. The National Institute of Corrections anticipates working with such jurisdictions to explore the operational issues surrounding the use of this technology.

Method. A survey instrument was sent to the attorneys general in the fifty states and to the District of Columbia Department of Corrections, which manages the District's jails. A copy of the survey instrument is attached as Appendix 1. Where no response could be obtained from the office of the attorney general, contacts were initiated among other agencies—such as the state judicial administration, jail inspection agencies, and sheriff's departments in major cities—or relevant data were located in published material. Information for some of the latter states may be incomplete in regard to legislation or caselaw. However, through these methods some information was obtained for all but two states: Mississippi and New York.

Findings in Brief

The project found that authority to implement interactive video exists in at least twenty-nine of the forty-nine jurisdictions for which information was obtained, or more than one-half of responding jurisdictions.

- Respondents from twenty-seven states reported that interactive video is currently being used for court proceedings in one or more locations.
- Half of the states that are using interactive video reported the existence of no authorizing legislation, rules, or caselaw.
- Among states reporting a specific authorization for interactive video, the authority has more often been through court administrative rules (ten states) than through legislation (eight states) or caselaw (five states).
- Few states reported caselaw relating to interactive video, and no state reported a legal challenge that has deterred agencies from using it. Courts have upheld its use as being equivalent to the defendant's personal appearance in the courtroom. Other cases have dealt with jurisdictions' failure to obtain a waiver of personal appearance in states where such a waiver is required.

Summary data on legal authority and requirements for interactive video, sites where the technology is used or being considered, and its specific applications for court proceedings are presented in Table 1.

Legal Authority for Interactive Video Linkage

Among the twenty-nine states reporting the use of interactive video for court proceedings, thirteen reported no formal legal authority for their use. Eight states reported the passage of authorizing legislation, and ten cited court administrative rules as the source of authorization. Five states cited caselaw that supports the use of video, but only one of these states (New Jersey) did not also report the existence of authorization in the form of either legislation or court rules.

Statutory authority. Respondents in eight states indicated that their legislatures have passed laws related to the use of interactive video for court proceedings. These states included California, Colorado, Louisiana, Missouri, Montana, North Carolina, Oregon, and Wisconsin. In each of these states, the legislatures acted to authorize use of the technology. Statutory language from many of these states is provided in Appendix II.

In two states, Massachusetts and Nevada, legislation was being developed at the time of the survey that was intended to encourage the adoption of interactive video systems. In Massachusetts, this was an initiative of the state sheriffs' association.

State legislation defines appropriate uses for video linkage. Felony and misdemeanor initial appearances, arraignments, and pleas are the main court proceedings in which jurisdictions are authorized to use interactive video. Pretrial release and bail hearings also were cited with some frequency. Subsequent proceedings, such as sentencing, often have more restrictive requirements to ensure the defendant's presence before the judge or ability to contest evidence face to face. In Montana, for example, the judge may not accept a guilty plea from a defendant who is not physically present in the courtroom. However, judges in Missouri can use video linkage to sentence persons who have previously signed a waiver of physical presence or who have entered a guilty plea.

Statutes also impose procedural requirements on how interactive video can be used:

- The technology is usually used at the judge's discretion.
- Some states require a waiver of the defendant's personal appearance in court to permit the use of interactive video for some or all types of proceedings. These states include California, Florida, Hawaii, Missouri, South Carolina, and Wisconsin.
- Though defendants in all states can demand an in-court appearance, at least one state (Wisconsin) requires defendants who object to the use of interactive video to show good cause.
- In Louisiana, state legislation permits each judicial district to adopt its own rules.

Several respondents referred to laws defining the use of videotaped testimony for specific types of criminal trials, e.g., trials of persons accused of child sexual abuse. Though not directly applicable to the present topic, these laws may be useful in establishing the type of situations in which face-to-face confrontation of witnesses by the defendant is not required.

Court administrative rules. In ten states, court administrative rules—either statewide or at the local level—provide authorization for jurisdictions to develop and use interactive video systems. Administrative rules also define various criteria and procedures. In some states, rules extend to defining the role of the state court administration in local system development and evaluation. The text of several rules appears in Appendix II.

The content of court rules illustrates their function in facilitating the use of video technology. For example, two states have taken differing approaches to the question of obtaining a signature from an offender at a remote site. South Carolina rules permit the defendant's signature to be sent by fax but require that it be followed promptly by a paper copy. Delaware rules permit a faxed signature to be considered legally valid.

Litigation. Five respondents identified caselaw in their states that specifically addresses the use of interactive video for court proceedings. These states include Florida, Idaho, Missouri, New Jersey, and Ohio. Case descriptions and/or citations are provided in Appendix III.

Reported court decisions focused on the defendant's personal presence in court, access to counsel, appropriateness of the technology for sentencing and probation revocation hearings, and requirements for waiver of personal presence by the defendant.

- Courts in New Jersey and Ohio affirmed that interactive video provides the defendant a presence at a public proceeding in open court.
- The Florida Supreme Court approved an amendment to court rules in 1988 that allowed the use of interactive video in felony and misdemeanor arraignments. Two appellate cases in 1990 and 1991 were remanded based on a failure to obtain written waivers of the defendants' personal appearance in the courtroom, and a 1991 appeal was denied because a signed waiver had been properly obtained. A 1993 decision found inappropriate a probation revocation hearing that was held by video with no waiver and no access to private counsel. Also found inappropriate was a 1994 juve-

nile detention hearing in which the judge overruled the defendant's preference to be physically present in court, and the defendant was not in a physical or mental condition that otherwise would have precluded his physical presence.

Some responses cited litigation that defines the appropriateness of other uses of video technology. For example, Alabama referred to restrictions on the use of video cameras in the courtroom, and Indiana cited caselaw that supports the use of videotaped advisement on the rights of the accused. Other caselaw cited refers to the use of video following removal of disruptive defendants from the courtroom or to provide testimony of child victims of abuse. Again, aspects of the findings and arguments in these cases may prove to be relevant to broader questions in the use of video communications.

Current Use of Interactive Video

Prevalence of interactive video. Sites where interactive video has been implemented include both metropolitan and rural areas, and they are distributed randomly across the country rather than being clustered in any particular geographic region.

With courts in at least twenty-seven states using interactive video, it is evident that the technology is becoming established in accepted criminal justice practice. Agencies in another two states, Connecticut and West Virginia, are currently exploring the technology or have partially implemented systems. Respondents in two states (Maine and Montana) were uncertain whether the technology has actually been implemented within their states' borders but indicated favorable environments for its use.

A total of sixty-three counties or courts were identified as sites where interactive video is being used for court proceedings, and other jurisdictions were listed as possible sites. Some use of interactive video for probation and parole revocation hearings was also noted, and a new and expanding system in Delaware will link law enforcement and criminal justice agencies statewide, providing both interactive communication and access to offender data on a split screen.

Project data suggest that use of the technology is increasing:

- Four survey respondents indicated that video systems are now being expanded to serve additional sites within their jurisdictions.
- Survey respondents in four states described pilot programs, which indicates some likelihood of expansion in those states in the future.
- One state reported that court authorization has been granted for interactive video, but the technology so far has had only limited implementation statewide.
- One state has video technology in place in newly constructed regional jails that will be activated when the courts also become equipped.

Respondents' additional comments on the ways interactive video is being used were decidedly positive. For example, sites in Wisconsin are using interactive video for "almost every pretrial proceeding," and notes from Ohio indicate that one municipal court there "would not do without it."

Notes on System Implementation

Survey respondents volunteered additional comments that shed light on issues in planning and implementing interactive video systems:

- Lower costs and improved technology are converging to make systems practical after several years of study.
- Older systems based on picture-tel technology are being replaced with fiber optic systems to eliminate lag-time effects in transmission.
- Using regional telephone systems for data transmission is preferable to contracting with cable companies because it avoids the complication of interface between different cable companies at each end.
- When developing a new system, it can be important to get all the parties involved to sign an agreement on how the system will be used, so that objections to the technology do not surface after implementation.

Table 1. Use of Interactive Video for Court Proceedings: State Profiles

	Legal Authority for the Use of Interactive Video	Current Use of Interactive Video	
		Sites where interactive video is in use	Types of court proceedings involved
Alabama	No legislation or litigation; no other authority specified. [1]	None identified	N/A
Alaska	No legislation or litigation; no other authority specified.	1) Anchorage; 2) Fairbanks, pilot program using older technology; 3) possibly using at Kenai with compressed data. There are plans to expand its use.	Limited use for arraignments and other preliminary proceedings.
Arizona	Not specified.	Pilot program underway in Maricopa County.	Arraignment.
Arkansas	No legislation or litigation; no other authority specified.	None identified.	N/A
California	Legislation authorizes the use of interactive video. No litigation; no other authority specified.	Orange County.	Initial appearance, arraignment, plea; requires written waiver of presence.
Colorado	Legislation authorizes the use of interactive video. No litigation; no other authority specified.	2nd, 8th, 18th, and 21st Judicial Districts (Denver, Fort Collins, Littleton [municipal cases only], and Grand Junction); 10th Judicial District (Pueblo) is putting equipment in place.	Any appearances other than trial, unless judge or magistrate orders personal appearance in court.
Connecticut	No legislation or litigation; no other authority specified.	None identified.	Currently under consideration; may have been some exploration in past.

1. Though no restrictions specific to interactive video systems were cited, the Alabama respondent noted that video cameras are not to be used in courtroom unless the presiding judge so directs.

	Legal Authority for the Use of Interactive Video	Current Use of Interactive Video	
		Sites where interactive video is in use	Types of court proceedings involved
Delaware	Court rules authorize interactive video; no legislation or litigation.	In place in several sites, including Newcastle and Sussex Counties, Wilmington and Newark Police Depts., municipal courts, justice of the peace courts, state police, and a juvenile detention center; system is being developed by and linked through the attorney general; expansion to statewide network underway.	Initial arraignment; intake interviews by police depts.
District of Columbia	No legislation or litigation; no other authority specified.	None identified.	N/A
Florida	Use of video is authorized by the rules of criminal procedure. Caselaw upholds its use. No legislation identified.	1st, 4th, and 5th District Courts of Appeals; Broward and Dade Counties, and others	First appearances; arraignments at discretion of trial judge. Not permitted for sentencing or probation revocation hearings unless presence in court is waived.
Georgia	No legislation or litigation; no other authority specified.	None identified.	N/A
Hawaii	Authorized by rule of the supreme court. No litigation or legislation.	Though statewide authorization exists for the circuit courts, video has been implemented to date only in Honolulu.	Arraignments; requires written waiver of presence.
Idaho	Authorized by rule of the supreme court; litigation also supportive. No legislation.	Ada County; possibly Bannock County, where technology is in place.	First or subsequent appearance, bail hearing, arraignment, and plea.
Illinois	No legislation or litigation; no other authority specified.	None identified.	N/A
Indiana	Not specified [2]	None identified.	N/A
Iowa	No legislation or litigation; no other authority specified.	Scott and Clinton Counties	Not specified.

2. In Indiana, videotaped advisement of rights has been accepted by the courts.

	Legal Authority for the Use of Interactive Video	Current Use of Interactive Video	
		Sites where interactive video is in use	Types of court proceedings involved
Kansas	No legislation or litigation; no other authority specified.	Shawnee, Johnson, and Sedgwick Counties	First appearances; some bond reduction motions.
Kentucky	No legislation or litigation; no other authority specified.	None identified.	N/A
Louisiana	Legislation authorizes use of video. No litigation; no other authority specified.	East Baton Rouge Parish	Arraignment and pleas; 72-hour initial hearings.
Maine	Authorized by rule of court. No legislation or litigation.	Possibly Cumberland County	Rule authorizes experimental use for initial appearance, bail hearing, certain classes of arraignment.
Maryland	No legislation or litigation; no other authority specified.	Hartford, Prince George's, and Anne Arundel Counties.	Bail review.
Massachusetts	No legislation or litigation; no other authority specified. [3]	Hampden, Plymouth, and Suffolk Counties.	Pretrial arraignment; bond review; warrant removal; attorney counsel.
Michigan	Authorized by administrative order of the supreme court; each county must apply for supreme court approval. No litigation or legislation.	Genessee County; possibly others.	Arraignment, pretrials, pleas, misdemeanor sentencing, hearings to show cause.
Minnesota	No legislation or litigation; no other authority specified.	None identified.	N/A
Mississippi	(No response)		
Missouri	Existing legislation and caselaw both support use of video. No other authority specified.	Cole County; possibly others.	First appearance; waiver of preliminary hearing; arraignment where plea of not guilty is offered, unless waiver is signed; any pretrial or post-trial hearing not allowing cross-examination of witnesses; sentencing after conviction, with waiver; sentencing after entry of guilty plea; any civil proceeding other than trial by jury.

3. Proposed legislation in support of interactive video has been developed by the Massachusetts Sheriffs' Association.

	Legal Authority for the Use of Interactive Video	Current Use of Interactive Video	
		Sites where interactive video is in use	Types of court proceedings involved
Montana	Legislation authorizes use of video technology. No litigation; no other authority specified.	Unknown.	Bail proceedings and arraignment; in a felony arraignment, the judge may not accept a guilty plea from a defendant not physically present in the courtroom.
Nebraska	No legislation or litigation; no other authority specified.	None identified.	N/A
Nevada	Legislation is being drafted. No litigation; no other authority specified.	Reno Municipal Court.	Arraignment.
New Hampshire	Authorized by county superior court. No legislation or litigation.	Hillsborough County (pilot project).	Not specified.
New Jersey	Caselaw supports use of video. No legislation; no other authority specified.	Essex County.	Initial appearance.
New Mexico	No legislation or litigation; no other authority specified.	None identified.	N/A
New York	(No response)		
North Carolina	Legislation supports use of video. No litigation; no other authority specified.	Guilford and Mecklenburg Counties; other counties are developing systems.	Pretrial release; defendant may move to prohibit use.
North Dakota	No legislation or litigation; no other authority specified.	None identified.	N/A
Ohio	Local courts authorize use of video. No legislation or litigation specified.	Akron Municipal Court, 1992 pilot; Bowling Greene Municipal Court; Delaware Municipal Court (possibly); Norwalk Municipal Court; Sandusky Municipal Court; Wayne County (possibly); Xenia Municipal Court and Court of Common Pleas.	Varies by jurisdiction: arraignment, pretrials, and/or sentencing.
Oklahoma	Not specified.	Carr, Oklahoma, and Tulsa Counties.	Arraignments only.
Oregon	Legislation authorizes use of video. No litigation; no other authority specified.	Multnomah, Klamath, and possibly Marion Counties.	Sentencing; probation and parole violation hearings.

	Legal Authority for the Use of Interactive Video	Current Use of Interactive Video	
		Sites where interactive video is in use	Types of court proceedings involved
Pennsylvania	No legislation or litigation; no other authority specified.	City and County of Philadelphia; possibly Allegheny.	Preliminary hearings and arraignments.
Rhode Island	No legislation or litigation; no other authority specified.	None identified.	N/A
South Carolina	Authorized by administrative order of supreme court. No legislation or litigation.	City of Hilton Head; Dorchester and Aikin Counties; Spartanburg; Greenville magistrate has pilot.	Permitted with defendant's written consent for non-capital initial appearances, bond hearings, contested motions, and acceptance of guilty pleas and sentencing.
South Dakota	No legislation or litigation; no other authority specified.	None identified.	N/A
Tennessee	No legislation or litigation; no other authority specified.	None identified.	N/A
Texas	Legislation may authorize; no litigation or other authority specified.	Travis and Harris Counties.	Not specified.
Utah	No legislation; no litigation or other authority specified.	Cash, Millard, Salt Lake, and Weber Counties.	Arraignments; probation hearings. Had used for parole hearings, but ceased.
Vermont	No legislation or litigation; no other authority specified.	None identified.	N/A
Virginia	No legislation or litigation; no other authority specified.	None identified.	N/A
Washington	No legislation or litigation; no other authority specified.	None identified.	N/A
West Virginia	No legislation or litigation; no other authority specified.	New regional jails are equipped for video linkage to circuit or magistrate courts, but courts are not yet equipped.	(Systems are not yet in use.)

	Legal Authority for the Use of Interactive Video	Current Use of Interactive Video	
		Sites where interactive video is in use	Types of court proceedings involved
Wisconsin	Legislation authorizes use of video technology. No litigation; no other authority specified.	Milwaukee County, Portage County, and Columbia/Dodge Counties.	"Almost every pretrial proceeding." Milwaukee Co. is using video arraignments for municipal court; at new jail, are awaiting supreme court hearing re: whether court reporter needed. Columbia/ Dodge Cos. are exploring use for prison inmates. Defendants must waive personal appearance.
Wyoming	No legislation or litigation; no other authority specified.	Laramie County	Felony first appearances and bonding.

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

September 28, 1999

MEMORANDUM TO ADVISORY COMMITTEE ON CRIMINAL RULES

SUBJECT: *Financial Disclosure and Habeas Corpus Rules*

Financial Disclosure

At the request of the Judicial Conference's Committee on Codes of Conduct in late 1998, the Standing Committee asked each of the advisory rules committees to examine the need for uniform rules requiring disclosure of financial interests patterned on Appellate Rule 26.1. It was decided that additional information on the experiences of courts was needed, and the Federal Judicial Center undertook a survey of the courts' practices. The Center plans to submit a final report on its study in January 2000. An interim report is attached.

If a consensus to adopt a uniform rule requiring financial disclosure develops, we plan to publish proposed amendments in August 2000. Under this timeframe, the advisory rules committees would need to approve the proposal at their respective spring 2000 meetings. During the January 2000 Standing Committee meeting, the advisory committees' reporters will undertake a coordinated effort to put forward a proposed uniform rule acceptable to all advisory rules committees. The preliminary views of the advisory committees at their respective fall 1999 meetings would help guide the reporters in their discussion at the Standing Committee meeting. As a starting point, it would be useful to know whether any advisory committee objects to or has reservations to adopting a rule identical or very similar to Appellate Rule 26.1.

The following materials are attached: (1) background information on the Appellate Rules Committee's drafting of Appellate Rule 26.1, (2) the actions of the Committee on Codes of Conduct addressing recusal problems and recommending solutions, (3) a series of newspaper articles criticizing the federal bench for recusal lapses, and (4) an interim FJC report.

Habeas Corpus Rules

Also attached is a memorandum from Judge Tommy Miller containing two minor amendments to Rules Governing § 2254 and § 2255 Proceedings. The Habeas Corpus Subcommittee approved the proposals. They will be discussed at the meeting.

John K. Rabiej

Attachments

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
SUITE 173
WALTER E. HOFFMAN UNITED STATES COURTHOUSE
600 GRANBY STREET
NORFOLK, VIRGINIA 23510-1915
(757) 222-7007

CHAMBERS OF
TOMMY E. MILLER
UNITED STATES MAGISTRATE JUDGE

September 7, 1999

FACSIMILE NO.
(757) 222-7027

The Honorable W. Eugene Davis
United States Circuit Judge
5100 U.S. Courthouse
800 Lafayette Street
Lafayette, Louisiana 70501

Dear Judge Davis:

Judge Carnes requested that I write you to advise that the Subcommittee on Habeas Corpus has agreed with two minor amendments to the 28 U.S.C. §§ 2254 and 2255 Rules.

Attached is a letter dated March 3, 1999 which sets forth these changes and the reasons for them.

I have also attached a draft of the proposed language change for each of the subsections (Attachment A).

I believe that this wraps up our recommendations for changes to the 28 U.S.C. §§ 2254 and 2255 Rules.

Respectfully submitted,

Tommy E. Miller
United States Magistrate Judge

cc: The Honorable Ed Carnes
Darryl W. Jackson, Esq.
Roger A. Pauley, Esq.
Professor David A. Schlueter, Reporter
John Rabiej, Chief
Rules Committee Support Staff

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
SUITE 173
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(757) 222-7007

CHAMBERS OF
TOMMY E. MILLER
UNITED STATES MAGISTRATE JUDGE

FACSIMILE NO.
(757) 222-7027

March 3, 1999

The Honorable Ed Carnes
United States Circuit Judge
United States Court of Appeals
for the Eleventh Circuit
15 Lee Street
Montgomery, Alabama 36104

Darryl W. Jackson, Esq.
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004

Roger A. Pauley, Esq.
Director, Criminal Legislation
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 2244
Washington, D.C. 20530

Re: Proposed Amendments to Habeas Corpus Rules

Dear Colleagues:

After spending considerable time attempting to offer you a proposed consolidated habeas corpus rule, I must concede defeat. I now believe that the § 2254 and § 2255 Rules are so different in significant areas that confusion would be more likely with a consolidated set of Rules than separated.

Enclosed are the present Rules applying to § 2254 and § 2255 procedures set out in a side-by-side format for your view (Attachment A). You will note that several of the Rules could be easily consolidated, e.g., Rule 2(c) of the § 2254 Rules and Rule 2(b) of the § 2255 Rules. However, there are such significant differences in many of the other Rules that I withdraw my request that we

consider consolidation.

In making my word-by-word study of the Rules, I did come up with two places where we might consider technical amendments:

1. 28 U.S.C. § 2255 Rule 2(b).

The last sentence of this rule as originally adopted in 1976 reads:

> The motion shall be typewritten or legibly handwritten and shall be signed and sworn to by the movant. (emphasis added).

See Attachment B.

In 1982 both Rule 2(a) of the § 2254 Rules and Rule 2(b) of the § 2255 Rules were amended in the last sentence of each to take advantage of 28 U.S.C. § 1746 which permits an unsworn declaration under perjury to be used in U.S. courts. See Attachment C. The same language was used in amending each rule. It appears that the crafters of the amendment to Rule 2(b) of the § 2255 Rules inadvertently used the word "petitioner" instead of "movant" in this sentence. The word "movant" is used elsewhere in the § 2255 Rules to describe the person seeking relief.

Since we are proposing amendments to these Rules anyway, I recommend that we suggest changing the word "petitioner" to "movant" in the last sentence of Rule 2(b) of the § 2255 Rules. The word identifying the person seeking relief will then be consistent throughout the § 2255 Rules.

2. Title of Magistrate Judge.

The title of the office of Magistrate was changed to Magistrate Judge in 1990 (Section 321 of Public Law 101-650). Both the Civil Rules and the Criminal Rules have been amended to reflect the change in title. I recommend that Rules 8(b) and 10 of both the § 2254 and § 2255 Rules be amended to reflect the new title of office.

Finally, I note that the full committee adopted our subcommittee proposal that Rule 1(b) of the § 2255 Rules be amended to apply the § 2255 Rules to proceedings filed under 28 U.S.C. § 2241 by a federal prisoner or detainee. After a word-by-word study of the § 2254 and § 2255 Rules I am concerned that federal prisoner proceedings pursuant to 28 U.S.C. § 2241 are more like § 2254 proceedings than motions under § 2255. I raise this concern now, however I recommend that we do nothing at this time and wait for public comment on the proposed change.

I believe that all of the members of the habeas subcommittee are also on style subcommittee A. With Judge Carnes' permission, perhaps we can get together on March 12, 1999 to discuss the proposals contained in this letter.

Respectfully submitted,

Tommy

Tommy E. Miller
United States Magistrate Judge

TEM:plc

Enclosures

Section 2255
Rule 2. Motion
(b) Form of Motion. The motion shall be in substantially the form annexed to these rules, except that any district court may by local rule require that motions filed with it shall be in a form prescribed by the local rule. Blank motions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the movant and of which he has or, by the exercise of reasonable diligence, should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The motion shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the ~~petitioner~~ movant.

Section 2254
Rule 8. Evidentiary Hearing
(b) Function of the magistrate judge.

(1) When designated to do so in accordance with 28 U.S.C. § 636(b), a magistrate judge may conduct hearings, including evidentiary hearings, on the petition, and submit to a judge of the court proposed findings of fact and recommendations for disposition.

(2) The magistrate judge shall file proposed findings and recommendations with the court and a copy shall forthwith be mailed to all parties.

(3) Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court.

(4) A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate judge.

Section 2255
Rule 8. Evidentiary Hearing
(b) Function of the magistrate judge.

(1) When designated to do so in accordance with 28 U.S.C. § 636(b), a magistrate judge may conduct hearings, including evidentiary hearings, on the motion, and submit to a judge of the court proposed findings and recommendations for disposition.

(2) The magistrate judge shall file proposed findings and recommendations with the court and a copy shall forthwith be mailed to all parties.

(3) Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court.

(4) A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate judge.

Section 2254

Rule 10. Powers of Magistrates ~~-~~Judges

The duties imposed upon the judge of the district court by these rules may be performed by a United States magistrate judge pursuant to 28 U.S.C. § 636.

(As amended Pub.L. 94-426, § 2(11), Sept. 28, 1976, 90 Stat. 1335; Apr. 30, 1979, eff. Aug. 1, 1979.)

Section 2255

Rule 10. Powers of Magistrates ~~Judges~~

The duties imposed upon the judge of the district court by these rules may be performed by a United States magistrate judge pursuant to 28 U.S.C. § 636.

(As amended Pub.L. 94-426, § 2(12), Sept. 28, 1976, 90 Stat. 1335; Apr. 30, 1979, eff. Aug. 1, 1979.)

(g) and shall conduct the hearing as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation. *These rules do not limit the appointment of counsel under 18 U.S.C. § 3006A at any stage of the case if the interest of justice so requires.*

RULE 9. DELAYED OR SUCCESSIVE PETITION

(a) DELAYED PETITIONS. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred. [If the petition is filed more than five years after the judgment of conviction, there shall be a presumption, rebuttable by the petitioner, that there is prejudice to the state. When a petition challenges the validity of an action, such as revocation of probation or parole, which occurs after judgment of conviction, the five-year period as to that action shall start to run at the time the order in the challenged action took place.]

(b) SUCCESSIVE PETITIONS. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition [is not excusable.] *constituted an abuse of the writ.*

RULE 10. POWERS OF MAGISTRATES

The duties imposed upon the judge of the district court by rules 2, 3, 4, 6, and 7 may be performed by a United States magistrate if

[page 9]

and to the extent that he is so empowered by rule of the district court, *and to the extent the district court has established standards and criteria for the performance of such duties*, except that when such duties involve the making of an order, under rule 4, dismissing the petition the magistrate shall submit to the court his report as to the facts and his recommendation with respect to the order to be made by the court.

* * * * * * *

RULES GOVERNING § 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS

* * * * * * *

RULE 2. MOTION

(a) NATURE OF APPLICATION FOR RELIEF. If the person is presently in custodypursuant to the federal judgment in question, or if not presently in custody may be subject to such custody in the future pursuant to such judgment, the application for relief shall be in the form of a motion to vacate, set aside, or correct the sentence.

(b) FORM OF MOTION. The motion shall be in *substantially* the form annexed to these rules, except that any district court may by local rule require that motions filed with it shall be in a form prescribed by the

Attachment B

local rule. Blank motions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. [The motion shall follow the prescribed form.] It shall specify all the grounds for relief which are available to the movant and of which he has or, by the exercise of reasonable diligence, should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The motion shall be typewritten or legibly handwritten and shall be signed and sworn to by the movant.

(c) MOTION TO BE DIRECTED TO ONE JUDGMENT ONLY. A motion shall be limited to the assertion of a claim for relief against one judgment only of the district court. If a movant desires to attack the validity of other judgments of that or any other district court under which he is in custody or may be subject to future custody, as the case may be, he shall do so by separate motions.

(d) RETURN OF INSUFFICIENT MOTION. If a motion received by the clerk of [the] *a* district court does not *substantially* comply with the requirements of rule 2 or 3, it may be returned [by the clerk] to the [movant] *movant, if a judge of the court so directs, together* with a statement of the reason for its return [, and it shall be returned if the clerk is so directed by a judge of the court]. The clerk shall retain a copy of the motion.

* * * * * * *

RULE 8. EVIDENTIARY HEARING

(a) DETERMINATION BY COURT. If the motion has not been dismissed at a previous stage in the proceeding, the judge, after the answer is filed and any transcripts or records of prior court actions in the matter are in his possession, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary

[page 10]

hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the motion as justice dictates.

(b) FUNCTION OF THE MAGISTRATE. When empowered to do so by rule of the district court, the magistrate may recommend to the district judge that an evidentiary hearing be held or, in the alternative, that the motion be dismissed. In doing so the magistrate shall give to the district judge a sufficiently detailed description of the facts to enable him to make a decision to hold or not to hold an evidentiary hearing.

(c) APPOINTMENT OF COUNSEL; TIME FOR HEARING. If an evidentiary hearing is required, the judge shall appoint counsel for a movant who qualifies for the appointment of counsel under 18 U.S.C. § 3006A (g) and shall conduct the hearing as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation. *These rules do not limit the appointment of counsel under 18 U.S.C. § 3006A at any stage of the proceeding if the interest of justice so requires.*

RULE 9. DELAYED OR SUCCESSIVE MOTIONS

(a) DELAYED MOTIONS. A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been

AGENDA ITEM - II-D-6
Santa Fe, New Mexico
October 6-7, 1994

MEMO TO: **Advisory Committee on Criminal Rules**

FROM: **Prof. Dave Schlueter, Reporter**

RE: **Rule 46; Proposal to Amend Rule to Include Reference to Release After Arrest for Violation of Probation or Supervised Release.**

DATE: **August 31, 1994**

Magistrate Judge Robert Collings (Boston) has suggested that Rule 46 be amended by adding a new provision which specifically addresses the applicability of the rule to those cases where a person has been arrested for violation of probation or supervised release. The amendment would require redesignation of a number of provisions in Rule 46 and conforming changes to Rules 32.1 and 40(d).

Currently, the topic of revocation or modification of probation or supervised release are covered in Rule 32.1 which specifically indicates that a person may be released pursuant to Rule 46(c) pending the revocation hearing. The problem, according to Magistrate Judge Collings is that the current version of Rule 46 does not include a reference to the defendant's burden of proof.

The first sentence of the new Rule 16(d)(3) would read:

> (3) Failure to Comply With a Request. If at any time during the course of the proceedings, it is brought to the attention of the court, **after compliance with subdivision (d)(2)**, that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

This suggested change is based on the changes to Rule 26(c) and 37(a)(2) to the Federal Rules of Civil Procedure which became effective on December 1, 1993. It seems to me to make eminent sense to require that any disputes respecting discovery in **both** criminal and civil cases to be conferenced between the parties before submitting it to the Court. If after conferring, agreement is reached, there is no need for the Court to become involved at all, thereby saving scarce judicial resources. If conferring does not result in complete agreement, it may result in partial agreement so that the dispute is narrowed when it is presented to the judicial officer. I would require that the obligation to confer be imposed not only on motions seeking the discovery provided in Rule 16 but in **any** situation in which discovery is sought in a criminal case.

2. RULE 46 (and conforming changes to Rules 32.1 and 40(d))

I suggest adding a new subdivision (d) to Rule 46 and renumbering the present subdivisions (d), (e), (f), (g) and (h) as (e), (f), (g), (h) and (i). The new subdivision would read as follows:

> (d) Release after Arrest for Violation of Probation or Supervised Release. **Eligibility for release after the arrest of a probationer or supervised releasee charged with violating the terms of probation or supervised release shall be in accordance with 18 U.S.C. § 3143. The burden of proving that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant by clear and convincing evidence.**

This change would require that the references to Rule 46(c) contained in Rule 32.1(a) and the proposed Rule 40(d) be changed to refer to Rule 46(d) rather than 46(c).

The reason for this change is that both Rule 46(c) and 18 U.S.C. § 3143 deal with release or detention of a defendant pending sentence or appeal. Neither deals with those arrested for violation of probation or supervised release. Rule 32.1(a) and the proposed Rule 40(d) make Rule 46(c) applicable, which, in turn, provides that § 3143 is applicable. The problem arises because § 3143(a) excepts from it terms "a person for whom the applicable guidelines promulgated pursuant to 28 U.S.C. 994 does not recommend a term of imprisonment." Since the Sentencing Commission has elected at this time to promulgate only "policy statements" rather than guidelines with respect to revocation of probation and supervised release, it can be argued that the requirement of detention unless the defendant proves by clear and convincing evidence that he/she will not flee or pose a danger is inapplicable to cases in which a defendant is charged with violating the conditions of probation or supervised release. I do not believe that the drafters of the rule intended such a result. Rather, I think that they intended that the burden be on the defendant by clear and convincing evidence. Thus, Rule 46 should be changed so that it is clear that in cases of arrests for violations of probation or supervised release, the burden is on the defendant to prove **by clear and convincing evidence** that the defendant will not flee or pose a danger to the community. As Rule 46(c) presently reads, the burden is on the defendant but what that burden is (i.e. preponderance of the evidence, clear and convincing evidence) is not stated and not discernible from a reference to § 3143 because no guidelines have been promulgated for those categories of cases.

3. RULE 40(a)

I propose a change to Rule 40(a) which would allow a person who is arrested in one district be taken before the nearest available magistrate judge in the district of origin[1] **if** (1) the nearest available magistrate judge in the district of origin is less than 100 miles from the place of arrest **and** (2) an initial appearance before a magistrate judge in the district of origin can be scheduled before the close of business on the day of arrest or on the day after arrest if the arrest is made after business hours. I believe that such a change would be of substantial benefit to a defendant and result in a considerable saving of judicial time as well as the time of deputy U.S. marshals and other law enforcement personnel.

The problem as I see it rests on the notion that the term "nearest available federal magistrate [judge] in the first sentence of Rule 40(a) refers to the nearest available federal magistrate judge **in the district of arrest.** If this is a correct interpretation, a considerable amount of time is wasted when a

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[1] Hereinafter, "district of origin" shall refer to the district in which the charge is pending.

U.S. Department of Justice

Criminal Division

Washington, DC 20530-0001

September 9, 1999

MEMORANDUM

To: Peter G. McCabe, Esq.

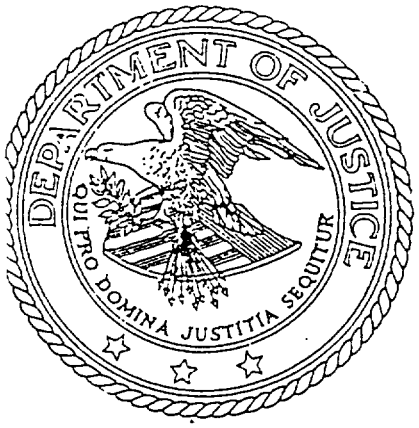
From: Roger A. Pauley RAP

Re: Possible clarifying legislation under 18 USC 3148(b)

Recently, it was brought to my attention that a district court has held that under 18 U.S.C. 3148(b) only an attorney for the government – not the court sua sponte – may institute an action for revocation of a release order. United States v. Herrera, 29 F. Supp.2d 756 (N.D. Tex. 1998). Whatever the correctness of this holding as a matter of statutory interpretation, it is, as the court acknowledged, contrary to prevailing practice throughout the United States, and is at odds with the statutes and Rule governing revocation of probation and supervised release, both of which may be initiated by the court.

In order to avoid future litigation (I am advised that someone in New Jersey has filed a Bivens action against a Pretrial Services officer who initiated a 3148(b) proceeding), you may wish to consider including a corrective amendment in the pending or next "Judicial Improvements Act" (however it's styled) clearly allowing the court as well as the prosecutor to begin a release revocation proceeding under 3148(b).

I hope to see you next month in Williamsburg.



DEPARTMENT OF JUSTICE
CRIMINAL DIVISION
OFFICE OF POLICY & LEGISLATION
VOICE PHONE 202/514-3202
FAX NUMBER 202/514-4042

FAX COVER SHEET

DATE: Sept. 9

TO: Peter G. McCabe CTS#

ORGANIZATION:

FAX #

VOICE #

FROM: Roger Pauley

PHONE NUMBER: 202/514

RE:

MESSAGE Please see attached

NUMBER OF PAGES
INCLUDING COVER SHEET 2

Proposed amendment to Rule 12.2(d) and commentary:

(d) Failure to Comply. If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's guilt or the issue of punishment in a capital case.

Commentary. Rule 12.2(d) is amended to extend sanctions for failure to comply with the rule to the penalty phase of a capital case. The selection of an appropriate remedy for the failure of a defendant to provide notice or submit to an examination under subdivisions (b) and (c) is entrusted to the discretion of the court. While subdivision (d) recognizes that the court may exclude the evidence of the defendant's own expert in such a situation, the court should also consider "the effectiveness of less severe sanctions, the impact of preclusion on the evidence at trial and the outcome of the case, the extent of prosecutorial surprise or prejudice, and whether the violation was willful." *Taylor v. Illinois*, 484 U.S. 400, 414 n.19 (1988) (citing *Fendler v. Goldsmith*, 728 F.2d 1181 (9th Cir. 1983)).

Ray TAYLOR, Petitioner,
v.
ILLINOIS.

No. 86-5963.

Supreme Court of the United States

Argued Oct. 7, 1987.

Decided Jan. 25, 1988.
Rehearing Denied March 28, 1988.
See 485 U.S. 983, 108 S.Ct. 1283.

Defendant was convicted before the Circuit Court, Cook County, James J. Heyda, J., of attempt murder, and he appealed. The Illinois Appellate Court, 141 Ill.App.3d 839, 96 Ill.Dec. 189, 491 N.E.2d 3, Campbell, J., affirmed. The Illinois Supreme Court denied leave to appeal, and the United States Supreme Court granted petition for certiorari. The Supreme Court, Justice Stevens, held that: (1) Sixth Amendment compulsory process clause may be violated by imposition of discovery sanction that entirely excludes testimony of material defense witness; (2) compulsory process clause does not create absolute bar to preclusion of testimony of defense witness as sanction for violating discovery rule; and (3) precluding testimony of proposed defense witness who was not disclosed in response to pretrial discovery request as sanction for failure to disclose witness was not unnecessarily harsh, on theory voir dire examination of proposed witness adequately protected prosecution from any possible prejudice resulting from surprise, or on theory client should not be held responsible for attorney's misconduct.

Affirmed.

Justice Brennan filed dissenting opinion in which Justices Marshall and Blackmun joined.

Justice Blackmun filed dissenting opinion.

[1] FEDERAL COURTS ⚖508
170Bk508
Sixth Amendment compulsory process clause claim was sufficiently well presented to state courts to provide United States Supreme Court jurisdiction over the claim, although compulsory process clause was not specifically articulated by defendant until he filed petition for rehearing in state appellate court and at trial defendant merely argued that trial court erred by not letting his witness, who was not identified in response to pretrial discovery request, testify; in state court appeal, defendant asserted that the error was constitutional and cited and relied upon compulsory process clause cases, and authority cited by defendant and manner in which fundamental right at issue had been described and understood by state courts established sufficient presentation of the constitutional question. U.S.C.A. Const.Amend. 6.

[2] CRIMINAL LAW ⚖627.8(6)
110k627.8(6)
Sixth Amendment compulsory process clause may be violated by imposition of discovery sanction that entirely excludes testimony of material defense witness. U.S.C.A. Const.Amend. 6.

[2] WITNESSES ⚖2(1)
410k2(1)
Sixth Amendment compulsory process clause may be violated by imposition of discovery sanction that entirely excludes testimony of material defense witness. U.S.C.A. Const.Amend. 6.

[3] CRIMINAL LAW ⚖627.8(6)
110k627.8(6)
Sixth Amendment compulsory process clause does not create absolute bar to preclusion of testimony of defense witness as sanction for violating discovery rule. U.S.C.A. Const.Amend. 6.

[3] WITNESSES ⚖2(1)
410k2(1)
Sixth Amendment compulsory process clause does not create absolute bar to preclusion of testimony of defense witness as sanction for violating discovery rule. U.S.C.A. Const.Amend. 6.

[4] CRIMINAL LAW ⚖627.8(6)
110k627.8(6)
If pattern of discovery violations is explicable only on assumption that violations were designed to conceal plan of criminal defendant to present fabricated testimony, it would be entirely appropriate to exclude the tainted evidence, regardless of whether other sanctions would also be merited, without violating Sixth Amendment compulsory process clause. U.S.C.A. Const.Amend. 6.

of the case, the extent of prosecutorial surprise or prejudice, and whether the violation was willful).

[5] A trial judge may certainly insist on an explanation for a party's failure to comply with a request to identify his or her witnesses in advance of trial. If that explanation reveals that the omission was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence, it would be entirely consistent with the purposes of the Compulsory Process Clause simply to exclude the witness' testimony. [FN20] Cf. United States v. Nobles, 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975).

FN20. There may be cases in which a defendant has legitimate objections to disclosing the identity of a potential witness. See Note, The Preclusion Sanction--A Violation of the Constitutional Right to Present a Defense, 81 Yale L.J. 1342, 1350 (1972). Such objections, however, should be raised in advance of trial in response to the discovery request and, if the parties are unable to agree on a resolution, presented to the court. Under the Federal Rules of Criminal Procedure and under the rules adopted by most States, a party may request a protective order if he or she has just cause for objecting to a discovery request. See, e.g., Fed. Rule Crim.Proc. 16(d)(1); Ill.Sup.Ct. Rule 412(i). In this case, there is no issue concerning the validity of the discovery requirement or petitioner's duty to comply with it. There is also no indication that petitioner ever objected to the prosecution's discovery request.

The simplicity of compliance with the discovery rule is also relevant. As we have noted, the Compulsory Process Clause cannot be invoked without the prior planning and affirmative conduct of the defendant. Lawyers are accustomed to meeting deadlines. Routine preparation involves location and interrogation of potential witnesses and the serving of subpoenas ***416** on those whose testimony will be offered at trial. The burden of identifying them in advance of trial adds little to these routine demands of trial preparation. [FN21]

FN21. "In the case before us, the notice-of-alibi rule by itself in no way affected petitioner's crucial decision to call alibi witnesses or added to the legitimate pressures leading to that course of action. At most, the rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the petitioner from the beginning planned to divulge at trial. Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, any more than it entitles him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand himself." Williams v. Florida, 399 U.S., at 85, 90 S.Ct., at 1898.

It would demean the high purpose of the Compulsory Process Clause to construe it as encompassing an absolute right to an automatic continuance or mistrial to allow presumptively perjured testimony to be presented to a jury. We reject petitioner's argument that a preclusion sanction is never appropriate no matter how serious the defendant's discovery violation may be.

IV

[6][7] Petitioner argues that the preclusion sanction was unnecessarily harsh in ****657** this case because the voir dire examination of Wormley adequately protected the prosecution from any possible prejudice resulting from surprise. Petitioner also contends that it is unfair to visit the sins of the lawyer upon his client. Neither argument has merit.

[8] More is at stake than possible prejudice to the prosecution. We are also concerned with the impact of this kind of conduct on the integrity of the judicial process itself. The trial judge found that the discovery violation in this case was both willful and blatant. [FN22] In view of the fact that petitioner's counsel ***417** had actually interviewed Wormley during the week before the trial began and the further fact that he amended his Answer to Discovery on the first day of trial without identifying Wormley while he did identify two actual eyewitnesses whom he did not place on the stand, the inference that he was deliberately seeking a tactical advantage is inescapable. Regardless of whether prejudice to the prosecution could have been avoided in this particular case, it is plain that the case fits into the category of willful misconduct in which the severest sanction is appropriate. After all, the court, as well as the prosecutor, has a vital interest in protecting the trial process from the pollution of perjured testimony. Evidentiary rules which apply to categories of inadmissible evidence--ranging from hearsay to the fruits of illegal searches--may properly be enforced even though the particular testimony being offered is not prejudicial. The pretrial conduct revealed by the record in this case gives rise to a sufficiently strong inference that "witnesses are being found that really

Robert Harold FENDLER, Plaintiff-Appellant,
v.
Robert GOLDSMITH, and the Attorney General of the State of Arizona, Defendants-Appellees.

No. 83-1501.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted June 13, 1983.

Decided Oct. 14, 1983.
As Amended March 21, 1984.

Petitioner appealed from denial by the United States District Court for the District of Arizona, Valdemar A. Cordova, J., of petition for habeas corpus. The Court of Appeals, Reinhardt, Circuit Judge, held that: (1) Arizona state courts erred in excluding testimony of important defense witness, and (2) since transcript of state court trial was not introduced in habeas corpus proceeding, it could not be determined whether error was harmless, and therefore remand was necessary.

Reversed and remanded.

Alarcon, Circuit Judge, filed dissenting opinion.

[1] CRIMINAL LAW ⚿629.5(2)
110k629.5(2)
Formerly 110k629
Arizona state courts erred in excluding testimony of important defense witness on ground that petitioner did not provide prosecution with address of such witness, as required by state criminal discovery rules, where petitioner's defense was severely hampered, any possible prejudice to prosecution's case was not nearly substantial enough to overcome petitioner's Sixth Amendment right to present a defense and any state interest in preparing for cross-examination or rebuttal of witness' testimony could have been accomplished by brief continuance. 17 A.R.S. Rules Crim.Proc., Rules 15.2, 15.7; U.S.C.A. Const.Amend. 6.

[2] CRIMINAL LAW ⚿629.5(1)
110k629.5(1)
Formerly 110k629
Trial court should seek to apply sanctions that affect evidence at trial and merits of case as little as possible.

[3] CRIMINAL LAW ⚿1162
110k1162
Where trial court's error affects substantial constitutional rights, court must determine whether error was harmless beyond reasonable doubt.

[4] HABEAS CORPUS ⚿864(1)
197k864(1)
Formerly 197k113(13), 197k113(18)
Since transcript of state court trial was not introduced in habeas corpus proceeding, Court of Appeals was unable to determine whether error in exclusion of testimony of important defense witness was harmless, and therefore, remand was required for further hearing.

[5] HABEAS CORPUS ⚿767
197k767
Formerly 197k90, 197k90.3(5)
Restrictions on federal court review of habeas petitions apply only to state courts' "issues on fact" which are basic, primary or historical facts, facts in the sense of recital of external events and credibility of their narrators. 28 U.S.C.A. § 2254(d).

[6] HABEAS CORPUS ⚿765.1
197k765.1
Formerly 197k765, 197k90, 197k90.3(5)
Restrictions on federal court review of habeas petitions do not apply to review of state court decisions regarding either purely legal questions or mixed questions of law and fact. 28 U.S.C.A. § 2254(d).

[7] HABEAS CORPUS ⚿767
197k767
Formerly 197k90, 197k90.3(5)
Federal court may give different weight to facts as found by state court and may reach different conclusion in light of legal standard in habeas proceedings. 28 U.S.C.A. § 2254.
***1182** Robert H. Fendler, pro per.

Linda Akers, Asst. Atty. Gen., Phoenix, Ariz., for defendants-appellees.

Appeal from the United States District Court for the

see also Barron, 575 F.2d at 757.

In any event, since our decision in Barron we have determined that the constitutionality of witness preclusion as a sanction for failure to comply with general criminal discovery rules is an open question. In Robbins v. Cardwell, 618 F.2d 581 (9th Cir.1980), we specifically considered the Arizona criminal discovery rules. After noting that Arizona permits the imposition of "extreme sanctions" such as "prohibiting testimony by a defense witness," we emphasized that "[t]he issue whether these sanctions can be applied for breach of Ariz.R.Crim.P. 15.2 without offending the confrontation clause of the sixth amendment and the right to present a defense which is implicit in the sixth amendment is a constitutional question of importance to the administration of criminal justice." Id. at 582. We then stated that the question had been "expressly reserved by the Supreme Court" and that it was not properly presented "for our determination" on the record before us. Id. Finally, we "reiterate[d] that imposition of the extreme sanctions contained in the Arizona rules would present important questions of constitutional dimensions if raised in a proper case." Id. at 583.

[1] In this case, it is also unnecessary to answer the constitutional question fully. Here, we narrow the question which we leave open to a choice between a rule flatly prohibiting use of the preclusion sanction, the Fifth Circuit approach, and a balancing test similar to that advocated by some state courts. We need not now choose between these alternatives because we find that, under either of these approaches, the Arizona state courts erred in excluding the testimony of an important defense witness.

Our analysis under the balancing test follows. At the outset we emphasize that for a balancing test to meet Sixth Amendment standards, it must begin with a presumption against exclusion of otherwise admissible defense evidence. No other approach adequately protects the right to present a defense. See Washington v. Texas, 388 U.S. at 19, 87 S.Ct. at 1923. With that starting point in mind, we proceed to weigh the relevant factors. [FN13]

FN13. Although the Arizona state courts applied a balancing test, we are not bound by the result. For reasons stated in the text of our opinion, we do not believe that the Arizona test as applied here meets the constitutional standard.

We begin with the most significant factor: how important was the witness? Fendler was indicted on one count of false book entry because he allegedly overvalued four separate assets: goodwill; account acquisition and retention; branch offices; and investment securities. See State v. Fendler, 622 P.2d at 34 n. 22. Fendler sought to call ***1189** both Schaffer and Pierson to testify that his valuation of the investment securities asset was correct. They were Fendler's expert witnesses on this point. Our review of the evidence presented at the federal magistrate's hearing indicates that Schaffer's testimony, at least, could have been of substantial importance to Fendler's defense on the investment securities issue. [FN14]

FN14. The Arizona Court of Appeals also found that the testimony of Schaffer "might have been relevant" to Fendler's defense. State v. Fendler, 127 Ariz. 464, 482, 622 P.2d 23, 41 (App.1980). We accept this factual finding. Accordingly, for purposes of Fendler's constitutional challenge, we must presume that the testimony was relevant. However, we attach greater constitutional significance to this fact than the Arizona courts apparently did.

Although Schaffer said at the magistrate's hearing that he would have preferred to examine "a minimal amount of additional data" on the valuation of the investment securities before reaching a final conclusion, he consistently maintained that he was "certain that [his] testimony would have been in a range which might have, as to the value of the bank, ... been crucial to [Fendler's] defense." Because the trial judge precluded him from testifying, it was obviously not necessary for Schaffer to make a final review of the valuation information. Nonetheless, Schaffer emphasized that he was "certain" that his testimony would have been helpful to Fendler. We see no reason to require that Schaffer's potential testimony meet any higher standard. It would be both unreasonable and illogical to require a defendant whose witness has been precluded from testifying to prove exactly what the witness would have said under oath. We find that Fendler's defense on the investment securities aspect of the false entry charge was severely hampered by the exclusion of Schaffer's testimony. [FN15]

FN15. The magistrate discusses Pierson's testimony in some detail, and we agree with his conclusion that it is impossible to tell whether Pierson's testimony would have been helpful to Fendler's case. However,

Proposed new Rule 12.2(c)(4):

(4) *Disclosure of Results of the Defendant's Expert Examination.* After disclosure under subdivison (c)(2) of the results of the government's examination, the court may order the defendant to disclose to the government the results of any defendant's expert examination that the defendant intends to introduce during the sentencing case in chief.

Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition[14]	Rule 12.2. Notice of Insanity Defense; Mental Examination[15]
(a) **Defense of Insanity.** If a defendant intends to rely upon the defense of insanity at the time of the alleged offense, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.	(a) **Notice of an Insanity Defense.** A defendant who intends to ~~rely on~~ a defense of insanity at the time of the alleged offense must notify the government's attorney in writing within the time provided for filing a pretrial motion, or at any later time the court directs. A defendant who fails ~~to comply with the requirements of this subdivision~~ to do so cannot ~~rely on~~ assert an insanity defense. The court may — for good cause — allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.
(b) **Expert Testimony of Defendant's Mental Condition.** If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of guilt, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.	(b) **Notice of Expert ~~Testimony~~ of a Mental Condition.** If a defendant intends to introduce expert ~~testimony~~ relating to a mental disease or defect or any other mental condition of the defendant bearing on either (1) the issue of guilt or (2) the issue of punishment in a capital case, the defendant must — within the time provided for the filing of pretrial motions or at a later time as the court directs — notify the attorney for the government in writing of this intention and file a copy of the notice with the clerk. The court may, for good cause, allow late filing of the notice or grant additional time to the parties to prepare for trial or make any other appropriate order.

[14] Matter underlined and struck out reflects proposed amendments being considered by full advisory committee, subject to edit by SSC.

[15] The SSC suggests that the Advisory Committee consider making the notice requirements in 12.1, 12.2, and 12.3 more uniform. See fn. 104.

any expert evidence from the defendant

(d) Failure to Comply. If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's guilt.	**(d) Failure to Comply.** If the defendant fails to give notice under Rule 12.2(b) or does not submit to an examination when ordered under Rule 12.2(c), the court may exclude ~~the testimony of the defendant's expert witness~~ on the issue of the defendant's mental disease, mental defect, or any other mental condition bearing on the defendant's guilt [~~or punishment in a capital case~~]. ~~(Subject to new amendment)~~
(e) Inadmissibility of Withdrawn Intention. Evidence of an intention as to which notice was given under subdivision (a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.	**(e) Inadmissibility of Withdrawn Intention.** Evidence of an intention as to which notice was given under Rule 12.2(a) or (b), later withdrawn, is not admissible in any civil or criminal proceeding against the person who gave notice of the intention.

or the issue of punishment in a capital case.

Proposed amendment to Rule 12.2(c)(3), Mental Examination of Defendant.

(3) ~~*Disclosure of*~~ *Statements by the Defendant.* No statement made by the defendant in the course of any examination provided for by this rule, whether ~~the examination be~~ with or without the consent of the defendant, no testimony by the expert based on such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant ~~has introduced testimony~~ (i) has introduced evidence after notice under subdivision (a) or (b)(1), or (ii) has introduced expert evidence after notice under subdivision (b)(2).