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

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TO: Hon. Robert E. Keeton, Chairman
Standing Committee on Rules of Practice and Procedure

FROM: Hon. Wm. Terrell Hodges, Chairman
Advisory Committee on Federal Rules of Criminal Procedure

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

DATE: May 14, 1992

I. INTRODUCTION

At its meeting in April 1992, the Advisory Committee on the Rules of Criminal Procedure acted upon proposed or pending amendments to a number of Rules of Criminal Procedure. This report addresses those proposals and the recommendations to the Standing Committee. A GAP Report and copies of the Rules and the accompanying Committee Notes are attached along with a copy of the minutes of the Committee's April 1992 meeting.

II. RULES OF CRIMINAL PROCEDURE PUBLISHED FOR PUBLIC COMMENT.

In July 1991, the Standing Committee approved amendments in a number of Rules and directed that they be published for public comment. Comments were received on several of the proposed amendments and were carefully considered by the Advisory Committee at its April 1992

meeting. The following discussion briefly notes any significant changes in the language of the proposed amendment and the Committee's recommended action:

A. Rule 12(i). Production of Statements.

This amendment, which requires production of a witness's statements after he or she has testified at a pretrial suppression hearing, received no written comments. The amendment was approved by the Advisory Committee by a unanimous vote. The Committee recommends that this amendment be approved and forwarded to the Judicial Conference.

B. Rule 16(a). Disclosure of Experts.

As approved for publication, the amendment to Rule 16(a) closely tracked a similar amendment to Civil Rule 26. After considering public comments to the Rule, including strong opposition from the Department of Justice, the Committee by a vote of 6 to 5 (The Chair cast the tie-breaking vote) approved a modified amendment which requires production of a "summary" of the expected expert testimony, etc. The Advisory Committee recommends that the amendment to Rule 16(a) be forwarded to the Judicial Conference.

C. Rule 26.2. Production of Statements.

This amendment requires production of a witness's statements after the witness has testified at trial; it recognizes similar amendments in Rules 12.1, 32(f), 32.1, 46 and in Rule 8 of the Rules Governing § 2255 Hearings. Those few comments which were received on this Rule were generally supportive of the amendment. The Committee, however, ultimately deleted references in the Rule to the fact that the witness's prior statement could be ordered disclosed after the court had considered the witness's "affidavit." Now, only the witness's "testimony" triggers the disclosure requirements. The amendment was approved by a 9 to 1 vote with one abstention.

The Advisory Committee recommends that the proposed amendment be approved and forwarded to the Judicial Conference.

D. Rule 26.3 Mistrial.

Rule 26.3 is a new rule which requires the trial court to obtain the views of both sides before ruling on a mistrial motion. Only one comment was received on this amendment and it was favorable. No major changes were made

in the Rule as published and the Committee approved this amendment by a unanimous vote. The Committee recommends that this Rule be approved and forwarded to the Judicial Conference.

E. Rule 32(f). Production of Witness Statements.

This amendment requires production of a witness's statements after they have testified at a sentencing hearing. Only one comment was received; it raised no major objections to the amendment. The Committee, however, removed any reference to affidavits. Thus, disclosure is required only after the witness actually testifies. This amendment was approved by a 9 to 0 vote with one abstention. The Committee recommends that the amendment be approved and forwarded to the Judicial Conference.

F. Rule 32.1. Production of Statements.

The amendment to Rule 32.1 requires disclosure of a witness's prior statements after the witness has testified at hearing to revoke or modify probation or supervised release. As originally published, disclosure would have been required after the court considered the witness's affidavit. That reference was deleted by the Committee. No written comments were received on this amendment. The amendment was approved by a vote of 9 to 0 with one abstention. The Committee recommends that the amendment be approved and forwarded to the Judicial Conference.

G. Rule 40. Committment to Another District.

The amendment to Rule 40 permits transmission of a facsimile copy of a warrant. Only one comment was received and it suggested that the original warrant be transmitted promptly; that proposal was rejected and the amendment was approved by a unanimous vote. The Advisory Committee recommends that the amendment be approved and forwarded to the Judicial Conference.

H. Rule 41. Search and Seizure.

Only one comment was received on this amendment, which permits consideration of a facsimile transmission in deciding whether to issue a search warrant. The comment recommended that the original be promptly forwarded. That suggestion was not adopted. The Committee decided, however, that the word "judge" following the words "Federal magistrate" should be removed to conform the rule to the definition of that term in Rule 54. The amendment was approved by a unanimous vote. The Advisory Committee

recommends that the amendment be approved and forwarded to the Judicial Conference.

I. Rule 46(i). Production of Statements.

This amendment requires disclosure of a witness's statements after the witness has testified a detention hearing. Although few comments were received on this rule, the Department of Justice strongly opposed the amendment on the grounds that the requirement at such an early stage in the case makes it extremely difficult to locate prior statements of its witnesses. After lengthy discussion, the Committee approved the amendment (with references to affidavits being removed) by a vote of 8 to 1. The Committee recommends that the amendment be approved and forwarded to the Judicial Conference.

J. Rule 8, Rules Governing Section 2255 Hearings.

This amendment requires production of a witness's statements after the witness has testified a Section 2255 hearing. The one comment received on this amendment pointed out the potential difficulty of locating a witness's prior statements where the hearing is held years later. After deleting references to "affidavits," the Committee approved the amendment by a vote of 9 to 0 with one abstention.

III. PROPOSED AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE.

A. In General.

At its April 1992 meeting, the Advisory Committee considered proposed amendments to a several Rules. It recommends that the following amendments be approved for publication and comment from the bench and the bar. Copies of the proposed amendments and the Committee Notes are attached.

B. Rule 16(a)(1)(A). Disclosure of Statements by Organizational Defendants.

The proposed amendment to Rule 16 fills a perceived gap in criminal discovery: disclosure of statements by persons associated with an organizational defendant. The amendment requires government disclosure of first, statements which would be discoverable as party admissions and second, a person's statements concerning acts for which the organization would be vicariously liable. The amendment is similar to one proposed recently by the American Bar

Association. The proposed amendment was adopted by the Advisory Committee by a unanimous vote.

C. Rule 29(b). Motion for Judgment of Acquittal.

This amendment, which was suggested by the Department of Justice, would treat motions for a judgment of acquittal in the same way, regardless of whether they are made at the close of the government's case or at the close of all of the evidence. That is, it permits the trial court to defer ruling on a motion for a judgment of acquittal made at the close of the government's case either before or after the jury returns its verdict. If the decision is reserved, only that evidence presented at the time of the motion may be considered. Although this amendment will not affect a large number of cases, the Committee believes that it strikes a good balance between the defendant's interest in avoiding a second trial and the government's interest in preserving its right to appeal a Rule 29 motion. The amendment was approved by the Committee by an 8 to 2 vote.

D. Rule 57. Rules by District Courts.

The proposed amendments to Rule 57 are intended to track similar amendments in the Civil, Appellate, and Bankruptcy Rules. The proposed amendment was approved by a unanimous vote.

E. Rule 59. Technical Amendments.

As with the proposed amendments to Rule 57, supra, the proposed amendments to Rule 59 are intended to track similar amendments in the Civil, Appellate, and Bankruptcy rules. In unanimously approving the proposed amendments, the Committee included the proviso that if the Standing Committee believed that references to statutory changes should be deleted from the proposed amendment, the Committee would concur with that view. The Committee has suggested a similar amendment to Federal Rule of Evidence 1102, infra.

IV. TECHNICAL AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE

The Advisory Committee recommends that Rule 32(e) be deleted. As written, the provision no longer accurately reflects the law regarding probation. In the Committee's view, this change could be treated as a technical amendment.

If the provision is deleted, it can be replaced by the proposed amendment discussed above regarding disclosure of a witness's statements.

If the Standing Committee agrees that the current Rule 32(e) should be repealed, the Advisory Committee recommends that new Rule 32(f), which was circulated for public comment, supra, should be redesignated as Rule 32(e).

V. RULES OF EVIDENCE.

A. Rules Circulated for Public Comment; Rules 702 & 705

There are currently no Evidence Rules out for public comment which have been proposed by the Criminal Rules Committee. At its April 1992 meeting, however, the Committee discussed the proposed amendments to Federal Rules of Evidence 702 and 705. As before, it believes that there are still serious concerns about the proposed amendments as they apply to criminal trials. After extended discussion on the proposed amendments, the Committee voted unanimously to urge the Standing Committee to table the proposed amendments pending resolution of the question of which entity should be responsible for proposing amendments to the Rules of Evidence, discussed infra.

B. Proposed Amendments to Federal Rules of Evidence.

1. The Committee proposes that an amendment to Federal Rule of Evidence 804(a) be approved for circulation for public comment. The proposed amendment, which is attached, would permit the trial court to decide that a hearsay declarant of "tender years" is unavailable due to a "substantial likelihood that testifying would result in seriour physical, psychological, or emotional trauma..." The amendment would fill a gap in the Federal Rules of Evidence and recognizes a rule which most states have adopted in one form or another: child hearsay statements. The amendment is not limited to child declarants, however. It extends to those whose emotional or psychological age is akin to that of a child.

2. Proposed Amendment to Rule 1102.

The Committee proposes that Federal Rule of Evidence 1102 be amended to permit the Judicial Conference to make technical changes, etc. to the Federal Rules of Evidence in

the same manner proposed for similar changes in the Criminal, Civil, Appellate, and Bankruptcy Rules. A copy of the proposed amendment and Committee Note are attached. The Committee recommends that the proposed amendment be circulated for public comment.

C. Proposal to Create Advisory Committee on Evidence Rules.

1. In General.

During the last year the Committee has dedicated portions of three of its meetings to the discussion of what, if any, changes should be made in the procedures for proposing or considering proposed changes to the Federal Rules of Evidence. At the Fall 1991 meeting, the Chair appointed a special subcommittee to review the Rules of Evidence for possible problem areas and, if appropriate, propose amendments. The subcommittee, chaired by Professor Steve Saltzburg did so, and as a result several amendments are under active consideration. One of them, an amendment to Rule 804, is discussed supra.

As noted in the following discussion, for approximately the last eight years, the primary responsibility for the Rules of Evidence has rested in the Criminal Rules Advisory Committee. For reasons cited in the following discussion, the Committee believes that on the whole the existing structure has worked fairly well and that there should be no new Advisory Committee for the Rules of Evidence.

2. Background.

The Committee understands that at present there appear to be three principal options for dealing with the Rules of Evidence: First, create a new Evidence Advisory Committee. Second, create an ad hoc committee composed of members from the Criminal and Civil Rules Committees. Third, maintain the status quo with some clarification as to which Committee would have primary jurisdiction.

At its April 1992 meeting, Professor Saltzburg provided an in-depth account of how the Criminal and Civil Rules Committees had agreed some years ago to deal with amendments to the Rules of Evidence. He indicated that in 1985, the Judicial Conference had asked the Chief Justice to appoint an Evidence Advisory Committee. When no action was taken on that proposal, the Chairs of the Standing Committee (the late Judge Gignoux) and the Criminal Rules (Judge Lacey) and Civil Rules (Judge Weiss) Advisory Committees agreed that

the primary responsibility for monitoring the evidence rules would reside in the Criminal Rules Committee. In making that decision, the Chairs believed that those instances where evidence issues would tend to be dispositive on appeal were more likely to occur in criminal, rather than civil, cases. Since then, the Criminal Rules Committee has routinely monitored and considered proposed evidence amendments which affect both civil and criminal practice. For example, in the late 1980's the Committee undertook the major project of gender-neutralizing the Rules of Evidence. In the last several years the Criminal Rules Committee has, on the average, submitted at least one evidence amendment each year to the Standing Committee for its consideration.

The Committee believes that the rules of evidence do not require the close monitoring and changes that rules of procedure do. There is also concern among members of the Committee that a new advisory committee would be inclined to set an active agenda which would almost certainly take on a life of its own and generate undesirable and unnecessary length and complexity in the rules of evidence. Some members have observed that despite suggested changes from academic commentators, the rules of evidence have worked well without frequent amendments.

3. Recommendation

The Advisory Committee recommends that the Criminal Rules Advisory Committee's name be changed to the "Advisory Committee for Rules of Criminal Procedure and Evidence" and that some provision be made for additional input from the other Advisory Committees. especially the Civil Rules Committee. One option would be for the addition of several Civil Rules Committee members who would be permitted to vote on proposed amendments to the Rules of Evidence.

4. Justifications for Recommendation.

The Committee believes that leaving the responsibility for the Rules of Evidence in the Criminal Rules Committee, and clarifying that role through a minor name change, is the most appropriate course of action. In reaching that conclusion the Committee has carefully considered the following points:

First, the Committee agrees with the view that the Rules of Evidence should be monitored. Second, it is important to fix the authority for doing so. Third, the Rules of Evidence have worked well since they went into effect in 1975. Where changes have been necessary they have been made. For example, the Criminal Rules Committee in the

last two years has recommended amendments to Rule 404 and 609 which were ultimately made. Fourth, there is some relationship between the rules of procedure and the Rules of Evidence and it makes sense to have one of the procedural rules committees involved in the process of recommending amendments to the rules of evidence. Fifth, to the extent that there may be a conflict between the civil and criminal practice, those conflicts can be addressed through coordination with the Civil Rules Committee. Sixth, evidence issues are more likely to be dispositive, on appeal, in a criminal case than in a civil case. Finally, the Criminal Rules Committee has the background, experience, and institutional memory for dealing with the evidence rules. For example, one of the members and the Reporter are law professors who teach evidence and routinely write and lecture on the subject. Another member of the Committee is an adjunct law professor who teaches evidence. At one other member of the Committee was active in the drafting of the Rules of Evidence in 1974.

The Committee believes that it would be helpful for the public to see that despite the absence of massive amendments to the rules of evidence, the Committee has been active in considering amendments which specifically and directly target a needed change. One possible means of educating the public would be to publish the Committee's actions regarding the rules of evidence in the Federal Rules Decisions.

VI. CONTINUATION OF CRIMINAL RULES COMMITTEE

The Committee understands that every five years the Judicial Conference considers whether the individual Advisory Committees should continue in existence. At its April 1992 meeting, the Committee unanimously voted to recommend to the Standing Committee that the Criminal Rules Committee be continued.

Attachments:

GAP Report
Proposed Amendments
Minutes of April 1992 Meeting

TO: **Hon. Robert E. Keeton, Chairman**
Standing Committee on Rules of Practice and Procedure

FROM: **Hon. Wm. Terrell Hodges, Chairman**
Advisory Committee on Rules of Criminal Procedure

SUBJECT: **GAP Report: Explanation of Changes Made Subsequent to the Circulation for Public Comment of Rules 12, 16, 26.2, 26.3, 32, 32.1, 40, 41, 46, and Rule 8 of the Rules Governing Section 2255 Hearings.**

DATE: **May 15, 1992**

At its July 1991 meeting, the Standing Committee approved the circulation for public comment of proposed amendments to the following Rules of Criminal Procedure and Rules Governing Section 2255 Hearings:

Rule 12(i). Production of Statements.
Rule 16(a). Disclosure of Experts.
Rule 26.2(c). Production of Statements.
Rule 26.3. Mistrial.
Rule 32(f). Production of Statements.
Rule 32.1(c). Production of Statements.
Rule 40. Committment to Another District.
Rule 41(c). Search and Seizure.
Rule 46(i). Production of Statements.
Rule 8, Rules Governing Section 2255 Hearings.

The Advisory Committee has considered the written submissions from members of the public who responded to the request for comment as well as the recommendations of the Standing Committee's Subcommittee on Style. Summaries of any comments on each Rule, the Rules, and the accompanying Committee Notes are attached. The Advisory Committee's actions on the amendments subsequent to the circulation for public comment are as follows:

1. Rule 12(i). Production of Statements.

There were no written comments on the amendment to Rule 12(i). In addition to stylistic changes, the Committee deleted the introductory, "Except as herein provided" language. The amendment deleting the last portion of the subdivision removed the necessity for that language.

2. Rule 16(a). Disclosure of Experts.

The Committee has made several substantive changes to the rule. In response to serious concerns from the Department of Justice, the Committee removed language from

the amendment which would have required a detailed statement of the testimony, etc. to be given by the expert witness. Some changes were also made in the Committee Note to reflect the fact that under the amendment, only a "summary" would be required. The Committee does not believe that the changes require republication and further comment.

3. Rule 26.2(c). Production of Statements.

In addition to changes in style, the Committee removed any reference in the amendment to "affidavits." Thus, as rewritten, a witness's prior statement need only be produced after that witness has actually testified. Similar changes were also made in the amendments to Rules 32(f), 32.1, 46, and Rule 8, Rules Governing Section 2255 Hearings.

4. Rule 26.3. Mistrial.

The Committee has made no changes in the Rule.

5. Rule 32(f). Production of Statements.

Only one comment was received on this amendment and it was favorable. As with the proposed amendment to Rule 26.2, discussed supra, the Committee has removed the reference to "affidavits" and made other suggested stylistic changes. If the Standing Committee agrees to forward this amendment and also to approve the Advisory Committee's recommendation that the current Rule 32(e) be repealed, then this amendment should be redesignated as 32(e).

6. Rule 32.1(c). Production of Statements.

The Committee removed the reference to "affidavits," as noted supra, and made several stylistic changes.

7. Rule 40(a). Committment to Another District.

Several changes in style were made to the amendment.

8. Rule 41(c). Search and Seizure.

The Committee deleted the word "judge" which had followed the words "federal magistrate," in order to conform the rule to the definition for that term found in Rule 54. The word "judge" had apparently been inadvertently included in the proposed amendment to reflect the change in the title of United States Magistrate Judge. However, in the context of this rule, a "federal magistrate" also includes other judges in the federal judiciary. The Committee Note was

revised slightly to reflect the Committee's decision not to expand the amendment to other electronic transmissions.

9. Rule 46(i). Production of Statements.

In addition to several sytlistic changes, the Committee deleted reference to "affidavits." The Committee Note was revised slightly to reflect concerns raised by the Department of Justice and one other commentator that it might be difficult to locate witness statements at early stages of a criminal prosecution. The Note indicates that if a statement is not available at the time of the detention hearing, the court may reconsider the issue if the statement is subsequent produced.

10. Rule 8, Rules Governing Section 2255 Hearings.

In addition to stylistic changes, the Committee deleted the reference to the fact that introduction of a witness's affidavit would trigger the requirement to produce that witness's statements.

Attachments:
Summaries of Comments
Lists of Commentators
Rules and Committee Notes

RULES OF CRIMINAL PROCEDURE*

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

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(i) PRODUCTION OF STATEMENTS AT SUPPRESSION HEARING. ~~Except as herein provided, rule~~ Rule 26.2 ~~shall apply~~ 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 ~~shall be~~ is deemed a government witness ~~called by the government, and upon a claim of privilege the court shall excise the portions of the statement containing privileged matter~~ .

COMMITTEE NOTE

The amendment to subdivision (i) is one of a series of contemporaneous amendments to Rules 26.2, 32(f), 32.1, 46, and Rule 8 of the Rules Governing § 2255 Hearings, which extended Rule 26.2, Production of Witness Statements, to other proceedings or hearings conducted under the Rules of Criminal Procedure. Rule 26.2(c) now explicitly states that the trial court may excise privileged matter from the requested witness statements. That change rendered similar language in Rule 12(i) redundant.

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* New matter is underlined. Omitted matter is lined through.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 12

I. SUMMARY OF COMMENTS: Rule 12(i)

The Committee received no written comments addressing the proposed amendment to Rule 12(i)

II. LIST OF COMMENTATORS: Rule 12(i)

None

III. COMMENTS: Rule 12(i)

None

Rule 16. Discovery and Inspection

(a) GOVERNMENTAL DISCLOSURE OF EVIDENCE.

(1) *Information Subject to Disclosure.*

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(E) EXPERT WITNESSES. At the defendant's request, the government must 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 as evidence-in-chief at trial. This summary must describe the opinions of the witnesses, the bases and the reasons therefor, and the witnesses' qualifications.

(2) *Information Not Subject to Disclosure.* Except as provided in paragraphs (A), (B), ~~and~~ (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

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

government or other government agents in connection with the investigation or prosecution of the case~~.~~. Nor does the rule authorize the discovery or inspection ~~or~~ of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

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(b) DISCLOSURE OF EVIDENCE BY THE DEFENDANT.

(1) *Information Subject to Disclosure.*

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(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-in-chief at trial. This summary must describe the opinions of the witnesses, the bases and reasons therefor, and the witnesses' qualifications.

COMMITTEE NOTE

New subdivisions (a)(1)(E) and (b)(1)(C) expand federal criminal discovery by requiring disclosure of the intent to rely on expert opinion testimony, what the testimony will consist of, and the bases of the testimony. The amendment is intended to minimize surprise that often results from unexpected expert testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination. See Eads, Adjudication

by Ambush: Federal Proscecutors' Use of Nonscientific Experts in a System of Limited Criminal Discovery, 67 N. C. L. Rev. 577, 622 (1989).

Like other provisions in Rule 16, subdivision (a)(1)(E) requires the government to disclose information regarding its expert witnesses if the defendant first requests the information. Once the requested information is provided, the government is entitled, under (b)(1)(C) to reciprocal discovery of the same information from the defendant. The disclosure is in the form of a written summary and only applies to expert witnesses that each side intends to call during its case-in-chief. Although no specific timing requirements are included, it is expected that the parties will make their requests and disclosures in a timely fashion.

With increased use of both scientific and nonscientific expert testimony, one of counsel's most basic discovery needs is to learn that an expert is expected to testify. See Gianelli, Criminal Discovery, Scientific Evidence, and DNA, 44 Vand. L. Rev. 793 (1991); Symposium on Science and the Rules of Legal Procedure, 101 F.R.D. 599 (1983). This is particularly important if the expert is expected to testify on matters which touch on new or controverisal techniques or opinions. The amendment is intended to meet this need by first, requiring notice of the expert's qualifications which in turn will permit the requesting party to determine whether in fact the witness is an expert within the definition of Federal Rule of Evidence 702. Like Rule 702, which generally provides a broad definition of who qualifies as an "expert," the amendment is broad in that it includes both scientific and nonscientific experts. It does not distinquish between those cases where the expert will be presenting testimony on novel scientific evidence. The rule does not extend, however, to witnesses who may offer only lay opinion testimony under Federal Rule of Evidence 701. Nor does the amendment extend to summary witnesses who may testify under Federal Rule of Evidence 1006 unless the witness is called to offer expert opinions apart from, or in addition to, the summary evidence.

Second, the requesting party is entitled to a summary of the expected testimony. This provision is intended to permit more complete pretrial preparation by the requesting party. For example, this should inform the requesting party whether the expert will be providing only background information on a particular issue or whether the witness will actually offer an opinion. In some instances, a generic description of the likely witness and that witness's qualifications may be sufficient, e.g., where a DEA

laboratory chemist will testify, but it is not clear which particular chemist will be available.

Third, and perhaps most important, the requesting party is to be provided with a summary of the bases of the expert's opinion. Rule 16(a)(1)(D) covers disclosure and access to any results or reports of mental or physical examinations and scientific testing. But the fact that no formal written reports have been made does not necessarily mean that an expert will not testify at trial. At least one federal court has concluded that that provision did not otherwise require the government to disclose the identity of its expert witnesses where no reports had been prepared. See, e.g., United States v. Johnson, 713 F.2d 654 (11th Cir. 1983, cert. denied, 484 U.S. 956 (1984)(there is no right to witness list and Rule 16 was not implicated because no reports were made in the case). The amendment should remedy that problem. Without regard to whether a party would be entitled to the underlying bases for expert testimony under other provisions of Rule 16, the amendment requires a summary of the bases relied upon by the expert. That should cover not only written and oral reports, tests, reports, and investigations, but any information that might be recognized as a legitimate basis for an opinion under Federal Rule of Evidence 703, including opinions of other experts.

The amendments are not intended to create unreasonable procedural hurdles. As with other discovery requests under Rule 16, subdivision (d) is available to either side to seek ex parte a protective or modifying order concerning requests for information under (a)(1)(E) or (b)(1)(C).

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 16(a)(1)(E)

I. SUMMARY OF COMMENTS: Rule 16(a)(1)(E)

The Committee received comments from six individuals or organizations which generally supported the proposed amendments which would require pretrial disclosure of expert testimony. The Justice Department also commented on the proposed amendment and cited several reasons for strongly opposing the change. Several commentators offered suggested changes concerning the scope of the disclosure requirement and the timing requirements.

II. LIST OF COMMENTATORS: Rule 16(a)(1)(E)

1. Robert Garcia, Prof., Los Angeles, CA., 3-18-92
2. Robert L. Hess, Esq., Los Angeles, CA, 1-24-92
3. Benedict P. Kuehne, Esq., Miami, Fla., 11-18-92
4. Robert S. Mueller, Esq. & J William Roberts, Esq., Wash. D.C., 4-16-92
5. Lawrence B. Pedowitz, Esq.,New York, N.Y., 2-15-92
6. Charles Pereyra-Suarez, Esq.,Los Angeles, CA, 2-14-92
7. Myrna S. Raeder, Prof., Los Angeles, CA, 1-31-92

III. COMMENTS: Rule 16(a)(1)(E)

Robert Garcia
Law Professor
Los Angeles, CA
Feb. 26, 1992

Professor Garcia supports the proposed amendment but concludes that it suffers from several limitations. First, the rule should require government notice without a request from the defense. Second, the government should be required to make its disclosure a reasonable time before trial and before any suppression hearings. Third, the government should be required to provide as much discovery in criminal

as in civil cases. He believes that proposed amendments to Civil Rule 26 and Rule of Evidence 702 will provide greater notice in civil cases. He also notes that the rule should explicitly provide procedures for permitting the defense ample time to prepare its case in light of the government disclosures, including a provision for deposing expert witnesses.

Robert L. Hess
Committee Chair, Los Angeles Chapter of FBA
Los Angeles, CA
Jan. 24, 1992

Mr. Hess has submitted a report from the Los Angeles Chapter of the Federal Bar Association which questions the need for the amendment to Rule 16; the issue of disclosure of experts has not been a problem in the Central District of California. In fact, the requirement might work to the disadvantage of the defense which will normally not have the resources to compile the report required by the proposed amendment. The amendment also requires the defense to make pretrial assessments of what, if any, expert testimony will be offered -- something that it may not always be able to do in terms of cost and strategy.

Benedict P. Kuehne
Private Practice
Miami,. Fla
Oct. 28, 1991

The commentator generally supports the proposed amendment to Rule 16 in that it will promote broader discovery and discourage trial by ambush.

Robert S. Mueller, III, Esq.
J. William Roberts, Esq.
US Justice Department & Advisory Committee of US Attorneys
Washington, D.C.
April 16, 1992

The Justice Department and the Attorney General's Advisory Committee of United States Attorneys is opposed to the proposed amendment to Rule 16(a)(1)(E). The commentators believe that the proposal would be "inimical to the interests of justice" and would "lead to greated opportunities to distort the truth-seeking function of the trial." In their view, there is no major problem with the current disclosure requirements and that the current

provisions in Rule 16 strike a fair balance. The rule is also overbroad in that it would include "summary" witnesses and other nonscientific expert witnesses. Those types of witnesses may not be identified until after the trial has begun. The amendment would also permit the defense to shape its defense improperly. And it would also slow down the plea negotiation process; defendants will wait until they see who the expert witnesses are before negoitiating. Finally, the amendment will burden the litigation system by fostering needless litigation.

Lawrence B. Pedowitz, Esq.
Chair, Assoc. of N.Y. Bar
New York, N.Y.
Feb. 15, 1992

Mr. Pedowitz has submitted a report from the Criminal Law Committee of the Association of the Bar of New York City. That report generally supports the proposed amendment to Rule 16 but suggests that it be expanded to parallel similar provisions in Civil Rule 26. It also questions whether the disclosure should apply to non-traditional expert witnesses and notes the problems that could arise from the prosecution's good-faith failure to supply disclosure where it decides during trial, for example, to present expert testimony.

Charles Pereyra-Suarez
Federal Courts Committee, LA County Bar Assoc.
Los Angeles, CA
Feb. 14, 1992

This commentator endorses the report filed by the Los Angeles Chapter of the Federal Bar Association, supra.

Myrna S. Raeder
Law Professor
Los Angeles, CA
Jan. 31, 1992

Professor Raeder generally supports the proposed amendment but suggests that first, the amendment be changed to reflect last minute decisions to present expert testimony and. Second, to discourage intentional delay the rule should be amended to require a specific time for compliance. Third, she is concerned about the requirement that a complete statement of all opinions be included; she perceives a potential problem with litigation over whether

the expert may be permitted to vary his or her testimony from the "script" in the disclosure. Finally, she questions the possible relationship with this amendment and Rule 16(a)(1)(D) and 16(a)(1)(B), which require disclosure of reports and examinations and tests. She suggests that the issue be, at a minimum, addressed in the accompanying commentary.

Rule 26.2. Production of Witness Statements ~~of Witnesses~~

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(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 any 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, ~~in the event of a conviction and an appeal by the defendant~~ if the defendant appeals a conviction, must ~~shall~~ be made available to the appellate court for the purpose of determining the correctness of the decision to excise the portion of the statement.

* * * * *

(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 ~~in the trial for the examination of such statement and for~~

~~preparation-for-its-use~~ so that counsel may examine the statement and prepare to use it in the ~~trial~~ proceedings.

* * * * *

(g) SCOPE OF RULE. Subdivisions (a)-(d) and (f) of this rule apply at a suppression hearing conducted under Rule 12, at trial under this rule, at sentencing under Rule 32(f), at a hearing to revoke or modify probation or supervised release conducted under Rule 32.1(c), at a detention hearing conducted under Rule 46(i), and at an evidentiary hearing conducted under Section 2255 of Title 28, United States Code.

COMMITTEE NOTE

New subdivision (g) recognizes other contemporaneous amendments in the Rules of Criminal Procedure which extend the application of Rule 26.2 to other proceedings. Those changes are thus consistent with the extension of Rule 26.2 in 1983 to suppression hearings conducted under Rule 12. See Rule 12(i).

In extending Rule 26.2 to suppression hearings in 1983, the Committee offered several reasons. First, production of witness statements enhances the ability of the court to assess the witnesses' credibility and thus assists the court in making accurate factual determinations at suppression hearings. Second, because witnesses testifying at a suppression hearing may not necessarily testify at the trial itself, waiting until after a witness testifies at trial before requiring production of that witness's statement would be futile. Third, the Committee believed that it would be feasible to leave the suppression issue open until trial, where Rule 26.2 would then be applicable. Finally, one of the central reasons for requiring production of statements at suppression hearings was the recognition that by its nature, the results of a suppression hearing have a profound and ultimate impact on the issues presented at trial.

The reasons given in 1983 for extending Rule 26.2 to a suppression hearing are equally compelling with regard to other adversary type hearings which ultimately depend on accurate and reliable information. That is, there is a continuing need for information affecting the credibility of witnesses who present testimony. And that need exists without regard to whether the witness is presenting testimony at a pretrial hearing, at a trial, or at a post-trial proceeding.

As noted in the 1983 Advisory Committee Note to Rule 12(i), the courts have generally declined to extend the Jencks Act, 18 U.S.C. § 3500, beyond the confines of actual trial testimony. That result will be obviated by the addition of Rule 26.2(g) and amendments to the Rules noted in that new subdivision.

Although amendments to Rules 32, 32.1, 46, and Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255 specifically address the requirement of producing a witness's statement, Rule 26.2 has become known as the central "rule" requiring production of statements. Thus, the references in the Rule itself will assist the bench and bar in locating other Rules which include similar provisions.

The amendment to Rule 26.2 and the other designated Rules is not intended to require production of a witness's statement before the the witness actually testifies.

Minor conforming amendments have been made to subsection (d) to reflect that Rule 26.2 will be applicable to proceedings other than the trial itself. And language has been added to subsection (c) to recognize explictly that privileged matter may be excised from the witness's prior statement.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 26.2

I. SUMMARY OF COMMENTS: Rule 26.2

Of the four commentators submitting statements on the proposed amendment to Rule 26.2 (production of witness statements), three favored the change. One suggested that the term "privileged information" in the amendment was ambiguous and another suggested that the concept of production of statements should be extended to other adversary type hearings. The Justice Department opposed the amendment insofar as it extends to pretrial detention hearings.

II. LIST OF COMMENTATORS: Rule 26.2

1. Robert L. Hess, Esq., Los Angeles, CA, 1-24-92.
2. Benedict P. Kuehne, Esq., Miami, Fla., 11-18-92.
3. Robert S. Mueller, III, Esq. & J.Williams Roberts, Esq., Wash. D.C., 4-16-92.
4. Lawrence B. Pedowitz, Esq.,New York, NY, 2-15-92

III. COMMENTS: Rule 26.2

Robert L. Hess
Committee Chair, Los Angeles Chapter of FBA
Los Angeles, CA
Jan. 24, 1992

Mr. Hess believes that there are several problems with the proposed amendment to Rule 26.2. First, he notes that there is no definition of "privileged information" in the Rule. He questions whether that term applies to more than the common law privileges. Second, it is not clear from the Rule how the withholding of privileged information is to be dealt with if it is exclupatory under Brady v. Maryland. Third, the remedy for violations is inadequate. Finally, he points out that the foregoing problems of defining "privileged information" also exist in the other disclosure rules (e.g., Rule 32(f), 32.1, 46).

Benedict P. Kuehne
Private Practice
Miami,. Fla
Oct. 28, 1991

Mr. Kuehne believes that extending the Jencks Act requirements in Rule 26.2 to other hearings is appropriate because it will enable the opposing party to question a witness thoroughly. At the same time, unwarranted disclosure will be prevented. Further, the disclosure requirments will avoid surprise, expedite the proceedings, and reduce disagreements which arise under Brady.

Robert S. Mueller, III, Esq.
J. William Roberts, Esq.
US Justice Department & Advisory Committee of US Attorneys
Washington, D.C.
April 16, 1992

The Justice Department and the Attorney General's Advisory Committee of United States Attorneys is opposed to the proposed amendment to Rule 26.2 insofar as it extends to pretrial detention hearings for two reasons. First, such hearings frequently involve dangerous persons and premature disclosure of witness statements could lead to harm to the witness. Second, there is also great difficulty in collecting witness statements at such an early stage in the prosecution. On balance, the benefits of the rule are outweighed by the burdens on the government.

Lawrence B. Pedowitz, Esq.
Chair, Assoc. of N.Y. Bar
New York, N.Y.
Feb. 15, 1992

Speaking on behalf of the Criminal Law Committee of the New York Bar Association, Mr. Pedowitz wholeheartedly agrees with the underlying rationale for the amendment. He suggests that Rule 26.2 be extended to other adversary type hearings, such as motions for new trials, and motions to dismiss indictments. He also urges the Standing Committee to recommend to Congress that the Jencks Act and the corresponding rules to be amended to give the court discretion to order production of a witness's statement before the witness testifies. He also recommends that the Committee Note include language which appears in the 1979 Note to the Rule to the effect that the rule is not intended to discourage the practice of earlier, voluntary disclosure.

Rule 26.3 Mistrial

Before ordering a mistrial, the court must provide an opportunity to 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.

COMMITTEE NOTE

Rule 26.3 is a new rule designed to reduce the possibility of an erroneously ordered mistrial which could produce adverse and irretreviable consequences. The Rule is not designed to change the substantive law governing mistrials. Instead it is directed at providing both sides an opportunity to place on the record their views about the proposed mistrial order. In particular, the court must give each side an opportunity to state whether it objects or consents to the order.

Several cases have held that retrial of a defendant was barred by the Double Jeopardy Clause of the Constitution because the trial court had abused its discretion in declaring a mistrial. See United States v. Dixon, 913 F.2d 1305 (8th Cir. 1990); United States v. Bates, 917 F.2d 388 (9th Cir. 1990). In both cases the appellate courts concluded that the trial court had acted precipitately and had failed to solicit the parties' views on the necessity of a mistrial and the feasibility of any alternative action. The new Rule is designed to remedy that situation.

The Committee regards the Rule as a balanced and modest procedural device that could benefit both the prosecution and the defense. While the the Dixon and Bates decisions adversely affected the government's interest in prosecuting serious crimes, the new Rule could also benefit defendants. The Rule ensures that a defendant has the opportunity to dissuade a judge from declaring a mistrial in a case where granting one would not be an abuse of discretion, but the defendant believes that the prospects for a favorable outcome before that particular court, or jury, are greater than they might be upon retrial.

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

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 26.3

I. SUMMARY OF COMMENTS: Rule 26.3

Only two comments were received on the proposed Rule 26.3 and both of those favored the new rule.

II. LIST OF COMMENTATORS: Rule 26.3

1. Robert L. Hess, Esq., Los Angeles, CA, 1-24-92

2. Lawrence B. Pedowitz, Esq.,New York, N.Y., 2-15-92

III. COMMENTS: Rule 26.3

Robert L. Hess
Committee Chair, Los Angeles Chapter of FBA
Los Angeles, CA
Jan. 24, 1992

Mr. Hess briefly states that his organization supports the change to Rule 26.3.

Lawrence B. Pedowitz, Esq.
Chair, Assoc. of N.Y. Bar
New York, N.Y.
Feb. 15, 1992

Speaking as the chair for the Criminal Law Committee of the New York Bar Association, Mr. Pedowitz indicates that his committee endorses the proposed rule because it will reduce the possibility of an erroneously ordered mistrial.

Rule 32. Sentence and Judgment

* * * * *

~~(e) PROBATION. After conviction of an offense not punishable by death or life imprisonment, the defendant may be placed on probation if permitted by law.~~

(e) PRODUCTION OF STATEMENTS AT SENTENCING HEARING

(1) In General. Rule 26.2 (a)-(d), (f) applies at a sentencing hearing under this rule.

(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.

COMMITTEE NOTE

The original subdivision (e) has been deleted due to statutory changes affecting the authority of a court to grant probation. See 18 U.S.C. 3561(a). Its replacement is one of a number of contemporaneous amendments extending Rule 26.2 to hearings and proceedings other than the trial itself. The amendment to Rule 32 specifically codifies the result in cases such as United States v. Rosa, 891 F.2d 1074 (3d. Cir. 1989). In that case the defendant pleaded guilty to a drug offense. During sentencing the defendant unsuccessfully attempted to obtain Jencks Act materials relating to a co-accused who testified as a government witness at sentencing. In concluding that the trial court erred in not ordering the government to produce its witness's statement, the court stated:

> We believe the sentence imposed on a defendant is the most critical stage of criminal proceedings, and is, in effect, the "bottom-line" for the defendant,

> particularly where the defendant has pled guilty. This being so, we can perceive no purpose in denying the defendant the ability to effectively cross-examine a government witness where such testimony may, if accepted, add substantially to the defendant's sentence. In such a setting, we believe that the rationale of Jencks v. United States...and the purpose of the Jencks Act would be disserved if the government at such a grave stage of a criminal proceeding could deprive the accused of material valuable not only to the defense but to his very liberty. Id. at 1079.

The court added that the defendant had not been sentenced under the new Sentencing Guidelines and that its decision could take on greater importance under those rules. Under Guideline sentencing, said the court, the trial judge has less discretion to moderate a sentence and is required to impose a sentence based upon specific factual findings which need not be established beyond a reasonable doubt. Id at n. 3.

Although the Rosa decision decided only the issue of access by the defendant to Jencks material, the amendment parallels Rules 26.2 (applying Jencks Act to trial) and 12(i) (applying Jencks Act to suppression hearing) in that both the defense and the prosecution are entitled to Jencks material.

Production of a statement is triggered by the witness's oral testimony. The sanction provision rests on the assumption that the proponent of the witness's testimony has deliberately elected to withold relevant material.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 32(f)

I. SUMMARY OF COMMENTS: Rule 32(f)

The Committee received only one written comment relating to Rule 32(f) and that commentator favored the amendment.

II. LIST OF COMMENTATORS: Rule 32(f)

1. Robert L. Hess, Esq., Los Angeles, CA, 1-24-92

III. COMMENTS: Rule 32(f)

Robert L. Hess
Committee Chair, Los Angeles Chapter of FBA
Los Angeles, CA
Jan. 24, 1992

Speaking on behalf of the Los Angeles Chapter of the FBA, Mr. Hess expresses approval of the proposed amendment to Rule 32. He does express some concern about the relationship between this rule and Rule 26.2, which includes the general term, "privileged information."

Rule 32.1. Revocation or Modification of Probation or Supervised Release.

* * * * *

(c) PRODUCTION OF STATEMENTS

(1) In General. Rule 26.2(a)-(d) and (f) applies at any hearing under this rule.

(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.

COMMITTEE NOTE

The addition of subdivision (c) is one of several amendments that extend Rule 26.2 to Rules 32(f), 32.1, 46, and Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255. As noted in the Committee Note to Rule 26.2, the primary reason for extending that Rule to other hearings and proceedings rests heavily upon the compelling need for accurate information affecting the witnesses' credibility. While that need is certainly clear in a trial on the merits, it is equally compelling, if not more so, in other pretrial and posttrial proceedings in which both the prosecution and defense have high interests at stake. In the case of revocation or

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

modification of probation or supervised release proceedings, not only is the defendant's liberty interest at stake, the government has a stake in protecting the interests of the community.

Requiring production of witness statements at hearings conducted under Rule 32.1 will enhance the procedural due process which the rule now provides and which the Supreme Court required in Morrissey v. Brewer, 408 U.S. 471 (1972) and Gagnon v. Scarpelli, 411 U.S. 778 (1973). Access to prior statements of a witness will enhance the ability of both the defense and prosecution to test the credibility of the other side's witnesses under Rule 32.1(a)(1), (a)(2), and (b) and thus will assist the court in assessing credibility.

A witness's statement must be produced only if the witness testifies.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 32.1

I. SUMMARY OF COMMENTS: Rule 32.1

Only one commentator expressed views on the proposed amendment to Rule 32.1 and he supported the change.

II. LIST OF COMMENTATORS: Rule 32.1

1. Robert L. Hess, Los Angeles, CA, 1-24-92.

III. COMMENTS: Rule 32.1

Robert L. Hess
Committee Chair, Los Angeles Chapter of FBA
Los Angeles, CA
Jan. 24, 1992

Speaking on behalf of the Los Angeles Chapter of the FBA, Mr. Hess expresses approval of the proposed amendment to Rule 32.1 He does express some concern about the relationship between this rule and Rule 26.2, which includes the general term, "privileged information."

Rule 40. Commitment to Another District.

(a). APPEARANCE BEFORE FEDERAL MAGISTRATE. If a person is arrested in a district other than that in which the offense is alleged to have been committed, that person must ~~shall~~ be taken without unnecessary delay before the nearest available federal magistrate. Preliminary proceedings concerning the defendant must ~~shall~~ be conducted in accordance with Rules 5 and 5.1, except that if no preliminary examination is held because an indictment has been returned or an information filed or because the defendant elects to have the preliminary examination conducted in the district in which the prosecution is pending, the person must ~~shall~~ be held to answer upon a finding that such person is the person named in the indictment, information or warrant. If held to answer, the defendant must ~~shall~~ be held to answer in the district court in which the prosecution is pending~~,~~ -- provided that a warrant is issued in that district if the arrest warrant was made without a warrant~~,~~ -- upon production of the warrant or a certifed copy thereof. The warrant or certified copy may be produced by facsimile transmission.

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* New matter is underlined. Matter to be deleted is lined through.

COMMITTEE NOTE

The amendment to subdivision (a) is intended to expedite determining where a defendant will be held to answer by permitting facsimile transmission of a warrant or a certified copy of the warrant. The amendment recognizes an increased reliance by the public in general, and the legal profession in particular, on accurate and efficient transmission of important legal documents by facsimile machines.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 40

I. SUMMARY OF COMMENTS: Rule 40

Two commentators offered their views on the proposed amendment which would permit a magistrate to consider a facsimile transmission of a warrant. Both favored the amendment although one suggested that the original copy of the warrant should be promptly transmitted to the court.

II. LIST OF COMMENTATORS: Rule 40

1. Robert L. Hess, Esq., Los Angeles, CA, 1-24-92.

2. Lawrence B. Pedowitz, Esq.,New York, N.Y., 2-15-92

III. COMMENTS: Rule 40

Robert L. Hess
Committee Chair, Los Angeles Chapter of FBA
Los Angeles, CA
Jan. 24, 1992

Mr. Hess, on behalf of the organization, supports the change to Rule 40; it "appropriately reflects technological advances." He suggests, however, that the original or certified copy of the warrant be forwarded promptly by nonfacsimile means so that it may be included in the Court file.

Lawrence B. Pedowitz, Esq.
Chair, Criminal Law Committee
Assoc. of N.Y. Bar
New York, N.Y.
Feb. 15, 1992

Mr. Pedowitz, as chair of the Criminal Law Committee for the New York Bar Association, offers a brief statement of support for the amendment. He notes that the amendment reflects a reasonable attempt to adapt procedural rules to changing technology.

Rule 41. Search and Seizure.

(c) ISSUANCE AND CONTENTS.

(2) *Warrant Upon Oral Testimony.*

(A) If the circumstances make it reasonable to dispense, in whole or in part, with a written affidavit, a Federal magistrate may issue a warrant based upon sworn ~~oral~~ testimony communicated by telephone or other appropriate means ~~.~~ , including facsimile transmission.

COMMITTE NOTE

The amendment to Rule 41(c)(2)(A) is intended to expand the authority of magistrates and judges in considering oral requests for search warrants. It also recognizes the value of, and the public's increased dependence on facsimile machines to transmit written information efficiently and accurately. As amended, the Rule should thus encourage law enforcement officers to seek a warrant, especially when it is necessary, or desirable, to supplement oral telephonic communications by written materials which may now be transmitted electronically as well. The magistrate issuing the warrant may require that the original affidavit be ultimately filed. The Committee considered, but rejected, amendments to the Rule which would have permitted other means of electronic transmission, such as the use of computer modems. In its view, facsimile transmissions provide some method of assuring the authenticity of the writing transmitted by the affiant.

The Committee considered amendments to Rule 41(c)(2)(B), Application, Rule 41(c)(2)C), Issuance, and Rule 41(g), Return of Papers to Clerk, but determined that allowing use of facsimile transmissions in those instances would not save time and would present problems and questions concerning the need to preserve facsimile copies.

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* New matter is underlined. Deleted matter is lined through.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 41(c)

I. SUMMARY OF COMMENTS: Rule 41(c)

One commentator submitted a brief statement supporting the proposed amendment.

II. LIST OF COMMENTATORS: Rule 41(c)

1. Lawrence B. Pedowitz, Esq.,New York, N.Y., 2-15-92

III. COMMENTS: Rule 41(c)

Lawrence B. Pedowitz, Esq.
Chair, Criminal Law Committee
Assoc. of N.Y. Bar
New York, N.Y.
Feb. 15, 1992

Mr. Pedowitz, as chair of the Criminal Law Committee for the New York Bar Association, offers a brief statement of support for the amendment to Rule 41. He notes that the amendment reflects a reasonable attempt to adapt procedural rules to changing technology.

Rule 46. Release from Custody

* * * * *

(i) PRODUCTION OF STATEMENTS.

(1) In General. Rule 26.2(a)-(d) and (f) applies at a detention hearing held under 18 U.S.C. § 3144.

(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, at the detention hearing the court may not consider the testimony of a witness whose statement is withheld.

COMMITTEE NOTE

The addition of subdivision (i) is one of series of similar amendments to Rules 26.2, 32, 32.1, and Rule 8 of the Rules Governing Proceedings Under 28 U.S.C. § 2255 which extend Rule 26.2 to other proceedings and hearings. As pointed out in the Committee Note to the amendment to Rule 26.2, there is continuing and compelling need to assess the credibility and reliability of information relied upon by the court, whether the witness's testimony is being considered at a pretrial proceeding, at trial, or a posttrial proceeding.. Production of a witness's prior statements directly furthers that goal.

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

The need for reliable information is no less crucial in a proceeding to determine whether a defendant should be released from custody. The issues decided at pretrial detention hearings are important to both a defendant and the community. For example, a defendant charged with criminal acts may be incarcerated prior to an ajudication of guilt without bail on grounds of future dangerousness which is not subject to proof beyond a reasonable doubt. Although the defendant clearly has an interest in remaining free prior to trial, the community has an equally compelling interest in being protected from potential criminal activity committed by persons awaiting trial.

In upholding the constitutionality of pretrial detention based upon dangerousness, the Supreme Court in United States v.Salerno, 481 U.S. 739 (1986), stressed the existence of procedural safeguards in the Bail Reform Act. The Act provides for the right to counsel and the right to cross-examine adverse witnesses. See, e.g., 18 U.S.C. § 3142(f)(right of defendant to cross-examine adverse witness). Those safeguards, said the Court, are "specifically designed to further the accuracy of that determination." 481 U.S. at 751. The Committee believes that requiring the production of a witness's statement will further enhance the fact-finding process.

The Committee recognized that pretrial detention hearings are often held very early in a prosecution, and that a particular witness's statement may not yet be on file, or even known about. The amendment nonetheless envisions that both sides should make reasonable efforts to locate such statements, assuming that they exist. If a witness's statement is not discovered until after the pretrial detention hearing, the court may examine the statement and reopen the proceeding if the statement would have a material bearing on the court's decision. See 18 U.S.C. § 3142(f).

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 46

I. SUMMARY OF COMMENTS: Rule 46

Of the three comments received on the proposed amendment to Rule 46 (production of statements at detention hearing), two of the commentators favored the change. Two commentators, including the Justice Department, raised concerns about the problem of producing a witness's statement at a pretrial detention hearing. At such an early stage in the proceeding it may be difficult to obtain such statements. The Justice Department adds a note of concern about potential danger to prosecution witness.

II. LIST OF COMMENTATORS: Rule 46

1. Robert L. Hess, Esq., Los Angeles, CA, 1-24-92.
2. Robert S. Mueller, III, Esq. & J. William Roberts, Esq., Wash. D.C., 4-16-92
3. Lawrence B. Pedowitz, Esq.,New York, N.Y., 2-15-92

III. COMMENTS: Rule 46

Robert L. Hess
Committee Chair, Los Angeles Chapter of FBA
Los Angeles, CA
Jan. 24, 1992

Speaking on behalf of the Los Angeles Chapter of the FBA, Mr. Hess expresses approval of the proposed amendment to Rule 46. He does express some concern, however, about the relationship between this rule and Rule 26.2, which includes the general term, "privileged information."

Robert S. Mueller, III, Esq.
J. William Roberts, Esq.
US Justice Department & Advisory Committee of US Attorneys
Washington, D.C.
April 16, 1992

The Justice Department and the Attorney General's Advisory Committee of United States Attorneys are opposed to

the proposed amendment to Rule 26.2 insofar as it extends to pretrial detention hearings for two reasons. First, such hearings frequently involve dangerous persons and premature disclosure of witness statements could lead to harm to the witness. Second, there is also great difficulty in collecting witness statements at such an early stage in the prosecution. On balance, the benefits of the rule are outweighed by the burdens on the government.

Lawrence B. Pedowitz, Esq.
Chair, Criminal Law Committee
Assoc. of N.Y. Bar
New York, N.Y.
Feb. 15, 1992

Speaking on behalf of the Criminal Law Committee of the New York Bar Association, Mr. Pedowitz voices approval of the concept underlying the disclosure requirements of the amendment. But he points out that in light of the fact that detention hearings often occur prior to indictment, it may be extremely difficult for the prosecutor to gather all of the prior statements of a witness. He therefore recommends that the Standing Committee add a provision which grants the magistrate or court some latitude in requiring disclosure.

Rule 8. Evidentiary Hearing.

* * * * *

(d) Production of Statements at Evidentiary Hearing.

(1) In General. Federal Rule of Criminal Procedure 26.2(a)-(d), and (f) applies at an evidentiary hearing under these rules.

(2) Sanctions for Failure to Produce Statement. If a party elects not to comply with an order under Federal Rule of Criminal Procedure 26.2(a) to deliver a statement to the moving party, at the evidentiary hearing the court may not consider the testimony of the witness whose statement is withheld.

COMMITEE NOTE

The amendment to Rule 8 is one of series of parallel amendments to Federal Rule of Criminal Procedure, 32, 32.1, and 46 which extend the scope of Rule 26.2 (Production of witness statements) to proceedings other than the trial itself. The amendments are grounded on the compelling need for accurate and credible information in making decisions concerning the defendant's liberty. See the Advisory Committee Note to Rule 26.2(g). A few courts have

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

recognized the authority of a judicial officer to order production of prior statements by a witness at a § 2255 hearing, see, e.g., United States v. White, 342 F.2d 379, 382, n.4 (4th Cir. 1959). The amendment to Rule 8 grants explicit authority to do so. The amendment is not intended to require production of a witness's statement before the witness actually presents oral testimony.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 8, RULES GOVERNING SECTION 2255 HEARINGS

I. SUMMARY OF COMMENTS: Rule 8, § 2255 Hearings

Two commentators submitted written statements on the proposed amendment. Although both favored the change, one raised concerns about the ability of the prosecution to locate a witness's statements after a great lapse of time and the other commentator raised concerns about the ambiguous term "privileged information" which is incorporated in this amendment by Rule 26.2.

II. LIST OF COMMENTATORS: Rule 8, § 2255 Hearings

1. Robert L. Hess, Esq., Los Angeles, CA, 1-24-92.

2. Lawrence B. Pedowitz, Esq.,New York, N.Y., 2-15-92

III. COMMENTS: Rule 8, § 2255 Hearings

Robert L. Hess
Committee Chair, Los Angeles Chapter of FBA
Los Angeles, CA
Jan. 24, 1992

Speaking on behalf of the Los Angeles Chapter of the FBA, Mr. Hess expresses approval of the proposed amendment to Rule 8 of the Rules Governing Section 2255 hearings. He expresses some concern about the relationship between this rule and Rule 26.2, which includes the general term, "privileged information."

Lawrence B. Pedowitz, Esq.
Chair, Criminal Law Committee
Assoc. of N.Y. Bar
New York, N.Y.
Feb. 15, 1992

Mr. Pedowitz, speaking on behalf of the Criminal Law Committee of the New York Bar Association, expresses strong support for the underlying rationale of disclosure requirements in the amendment. He notes, however, that where § 2255 hearings are held years after the fact, the

prosecutor may encounter problems in assembling prior statements of a witness. He recommends that the court be given some discretion in ordering disclosure where the task of gathering such statements is "unfairly burdensome."

Rule 16. Discovery and Inspection

(a) DISCLOSURE OF EVIDENCE BY THE GOVERNMENT.

(1) Information Subject to Disclosure.

(A) STATEMENT OF DEFENDANT. Upon request of a defendant the government must ~~shall~~ 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 shall 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 ~~Where the~~ defendant which is an

RULES OF CRIMINAL PROCEDURE*

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 ~~the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury~~ who (1) was, at the time of making the statement ~~that testimony~~, so situated as a ~~an~~ director, officer, ~~or~~ employee, or agent as to have been able legally to bind the defendant in respect to the subject of the statement ~~conduct constituting the offense~~, or (2) was, at the time of offense, personally involved in the alleged conduct constituting the offense and so situated as a ~~an~~ director, officer, ~~or~~ employee, or agent as to have been able legally to bind the defendant in respect to that alleged conduct in which the ~~witness~~ person was involved.

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COMMITTEE NOTE

The amendment is intended to clarify that the discovery and disclosure requirements of the rule apply equally to individual and organizational defendants. See In re United States, 918 F.2d 138 (11th Cir. 1990)(rejecting distinction between individual and organizational defendants). Because an organizational defendant may not know what its officers or agents have said or done in regard to a charged offense,

it is important that it have access to statements made by persons whose statements or actions could be binding on the defendant. See also United States v. Hughes, 413 F.2d 1244, 1251-52 (5th Cir. 1969), vacated as moot, 397 U.S. 93 (1970)(prosecution of corporations "often resembles the most complex civil cases, necessitating a vigorous probing of the mass of detailed facts to seek out the truth").

The amendment defines defendant in a broad, nonexclusive, fashion. See also 18 U.S.C. § 18 (the term "organization" includes a person other than an individual). And the amendment recognizes that an organizational defendant could be bound by an agent's statement, see, e.g., Federal Rule of Evidence 801(d)(2), or be vicariously liable for an agent's actions. The amendment does not address, however, the issue of what, if any, showing an organizational defendant would be required to establish that a particular person was in a position to legally bind the organizational defendant. But as with individual defendants, the organizational defendant is entitled to the statements without first seeking court approval. If disclosure is denied and the defendant seeks relief from the court, the Committee envisions that the organizational defendant might have to offer some evidence, short of a binding stipulation or judicial admission, that the person in question was able to bind legally the defendant.

RULES OF CRIMINAL PROCEDURE

Rule 29. Motion for Judgment of Acquittal

* * * * *

(b) RESERVATION OF DECISION ON MOTION. ~~If a motion for judgment of acquittal is made at the close of all the evidence, t~~ The court may reserve decision on ~~the~~ 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 decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

COMMITTEE NOTE

The amendment permits the reservation of a motion for a judgment of acquittal made at the close of the government's case in the same manner as the rule now permits for motions made at the close of all of the evidence. Although the rule as written did not permit the court to reserve such motions made at the end of the government's case, trial courts on occasion have nonetheless reserved ruling. See, e.g., United States v. Bruno, 873 F.2d 555 (2d Cir.), cert. denied, 110 S.Ct. 125 (1989); United States v. Reifsteck, 841 F.2d 701 (6th Cir. 1988). While the amendment will not affect a large number of cases, it should remove the dilemma in those close cases where at the end of the government's case the trial court would feel pressured into making an immediate, and possibly erroneous, decision or violating the rule as presently written by reserving its ruling on the motion.

The amendment also permits the trial court to balance the defendant's interest in an immediate resolution of the motion against the interest of the government in being able to appeal, should a guilty verdict result, a subsequent unfavorable ruling and thus attempt to have the verdict reinstated. Under the double jeopardy clause the government may appeal the granting of a motion for judgment of acquittal only if there would be no necessity for another trial, i.e., only where the jury has returned a verdict of guilty. United States v. Martin Linen Supply Co., 430 U.S. 564 (1977). Thus, the government's right to appeal a rule 29 motion is only preserved where the ruling is reserved until after the verdict.

In addressing the issue of preserving the government's right to appeal and at the same time recognizing double jeopardy concerns, the Supreme Court observed:

> We should point out that it is entirely possible for a trial court to reconcile the public interest in the Government's right to appeal from an erroneous conclusion of law with the defendant's interest in avoiding a second prosecution. In United States v. Wilson, 420 U.S. 332 (1975), the court permitted the case to go to the jury, which returned a verdict of guilty, but it subsequently dismissed the indictment for preindictment delay on the basis of evidence adduced at trial. Most recently in United States v. Ceccolini, 435 U.S. 168 (1978), we described similar action with approval: "The District Court had sensibly made its finding on the factual question of guilty or innocence, and then ruled on the motion to suppress; a reversal of these rulings would require no further proceeding in the District Court, but merely a reinstatement of the finding of guilt." Id. at 271.

United States v. Scott, 437 U.S. 82, 100 n. 13 (1978). By analogy, reserving a ruling on a motions for judgment of acquittal strikes the same balance as that reflected by the Supreme Court in Scott.

Reserving a ruling on a motion made at the end for the government's case does pose problems, however, where the defense decides to present its evidence and run the risk that its evidence would support the government's case. To minimize that problem, the amendment provides that the trial court is to consider only the evidence submitted at the time

of the motion in making its ruling, whenever made.

RULES OF CRIMINAL PROCEDURE

Rule 57. Rules by District Courts

(a) IN GENERAL. Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate notice and an opportunity to comment, make and amend rules governing its practice which are ~~not inconsistent~~ consistent with, but not duplicative of, these rules. Any local rules promulgated under this rule must be numbered or identified in conformity with any uniform system prescribed by the Judicial Conference of the United States. In all cases not provided by rule, the district judges and magistrate judges may regulate their practice in any manner consistent with these rules or those of the district in which they act.

(b) 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 and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district court is located. Copies of the rules and amendments so made by any district court shall upon their promulgation be furnished to the judicial

RULES OF CRIMINAL PROCEDURE

council and the Administrative Office of the United States Courts and shall be made available to the public. ~~In all cases not provided 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

Rule 57 provides flexibility to district courts to promulgate local rules of practice and procedure. But experience has demonstrated several problems. The amendments are intended to address those problems. First, as originally written, Rule 57 only prohibited rules which were inconsistent with the rules of criminal procedure. No mention was made of local rules which might attempt to paraphrase or merely duplicate an existing rule of criminal procedure. Such duplication can confuse practitoners where it is not entirely clear whether the national or local rule should prevail. Duplication can also obscure any local variations or special requirements. The amendment now specifically prohibits such. The prohibition would also apply to local rules which merely attempt to paraphrase a rule of criminal procedure.

Second, the absence of any uniform numbering of local rules can become an unnecessary trap for unwary counsel who may be unaware of applicable local provisions. To remedy that problem, the amendments require that local rules conform in numbering with any uniform system of numbering devised by the Judicial Conference of the United States.

RULES OF CRIMINAL PROCEDURE

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 or explanatory notes to conform to statutory changes, to correct errors in grammar, spelling, cross-references, or typography and to make other similar technical changes of form or style.

COMMITTEE NOTE

The amendment is intended to streamline the process of correcting clerical or other technical matters which appear from time to time in the Rules. For example, recent technical amendments were required in Rule 54 to reflect supreceding statutes which affected the prosecution of cases in Guam and the Virgin Islands by indictment or information. Currently such changes are formally revieved by the Supreme Court and Congress pursuant to the Rules Enabling Act.

FEDERAL RULES OF EVIDENCE

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant --

* * * * *

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity, or there is a substantial likelihood that testifying would result in serious physical, psychological, or emotional trauma to a declarant of tender years.

COMMITTEE NOTE

The amendment to Rule 804 is intended to fill a perceived gap in Federal Evidence. Although a majority of the States have adopted some variation of a child hearsay exception, either in their Rules of Evidence or in statutory form, no such exception exists in the Federal Rules of Evidence. The effect of the State adoptions has been that hearsay statements by child victims or witnesses may be admitted if certain procedural prerequisites are met.

The amendment does not adopt a specific exception for child hearsay statements. But it recognizes that calling a person of tender years to testify may present substantial dangers to the declarant. Thus, Rule 804(a)(4) has been amended to reflect that a declarant of tender years may be "unavailable" for purposes of the exceptions in the Rule due to a substantial likelihood of physical, psychological or emotional trauma. If the court finds the declarant

unavailable under those circumstances, the hearsay statement may be admissible under any of the exceptions in Rule 804(b), including the residual hearsay exception in Rule 804(b)(5). The Committee envisions that most litigation arising from this amendment will involve the residual exception.

The "declarant of tender years" provision has been included in Rule 804 to avoid confrontation clause problems, especially in criminal cases. See Idaho v. Wright, ____ U.S. ____, 110 S.Ct. 3139, 3147 (1990).

Unlike Uniform Rule 807 (Child Victims or Witnesses), and many similar State child-hearsay provisions, the amendment to Rule 804 does not include detailed procedural requirements Instead, the Rule leaves to the trial court the task of considering the surrounding circumstances of the making of the statement in determining whether the hearsay statement of a declarant of tender years is trustworthy. As noted by the Court in Idaho v. Wright, supra, the Constitution does not impose a "fixed set of procedural prerequisites to the admission of such statements at trial" and in some cases procedural requirements as conditions precedent might be inappropriate or unnecessary. 110 S.Ct. at 3148.

The Committee considered, but rejected, setting a particular age for child declarants under the Rule. Instead, it chose to use the broader term "tender years" to recognize that the provision could extend to older declarants whose mental and emotional age were comparable to that of a child. Regardless of the age of the declarant, unavailability requires a showing of a risk of serious harm to the declarant.

The amendment is not intended to preclude use of any other hearsay exception which might be available, such as excited utterances under Rule 803(2) or statements made for the purpose of medical diagnosis or treatment under Rule 803(4).

FEDERAL RULES OF EVIDENCE

Rule 1102. Amendments

Amendments to the Federal Rules of Evidence may be made as provided in section 2072 of title 28 of the United States Code. The Judicial Conference of the United States may amend these rules or explanatory notes to conform to statutory changes, to correct errors in grammar, spelling, cross-references, or typography and to make other similar technical changes of form or style.

COMMITTEE NOTE

The amendment streamlines the process of correcting or changing clerical or technical matters which appear from time to time in the Rules. For example, a purely technical change was made recently to the statutory reference in Rule 1102 to reflect statutory changes in the statutes governing the procedure for promulgating rules of procedure and evidence. Currently such technical changes are formally reviewed by the Supreme Court and Congress pursuant to 28 U.S.C. § 2071, et. seq..