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. Alicemarie H. Stotler, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Hon. W. Eugene Davis, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: **Report of the Advisory Committee on Criminal Rules**

DATE: **May 15, 1998**

I. Introduction

The Advisory Committee on the Rules of Criminal Procedure met on April 27 and 28, 1998 in Washington, D.C. and took action on a number of proposed amendments. The draft Minutes of that meeting are included at Attachment B. This report addresses matters discussed by the Committee at that meeting. First, the Committee considered public comments on proposed amendments to the following Rules:

- Rule 6. Grand Jury (Presence of Interpreters; Return of Indictment).
- Rule 7. The Indictment and the Information (Conforming Amendment).
- Rule 11. Pleas (Acceptance of Pleas and Agreements, etc.).
- Rule 24(c). Alternate Jurors (Retention During Deliberations).
- Rule 31. Verdict (Conforming Amendment).
- Rule 32. Sentence and Judgment (Conforming Amendment).
- Rule 32.2. Forfeiture Procedures (New Rule).
- Rule 38. Stay of Execution (Conforming Amendment).
- Rule 54. Application and Exception (Conforming Amendment).

As noted in the following discussion, the Advisory Committee proposes that these amendments be approved by the Committee and forwarded to the Judicial Conference.

Second, the Committee has approved amendments to Rules 5(c) which addresses the authority of a magistrate judge to grant a continuance of a preliminary hearing over the objection of a defendant and Rule 24(b) which would equalize the number of peremptory challenges in felony cases at 10 for each side. The Committee recommends, however, that those two rules not be published for public comment at this point.

Third, the Committee is considering proposed amendments to the following rules:

- Rule 10. Arraignment & Rule 43, Presence of Defendant.
- Rule 12.2. Notice of Insanity Defense or Expert Testimony of
- Defendant's Mental Condition .
- Rule 26. Taking of Testimony.
- Rule 32. Sentence and Judgment.
- Rule 32.1. Revocation or Modification of Probation or Supervised
- Release.
- Rule 43. Presence of Defendant.
- Rule 49. Service and Filing of Papers.
- Rules Governing Habeas Corpus Proceedings; Report of Subcommittee.

Finally, the Advisory Committee has several information items to bring to the attention of the Standing Committee.

II. Action Items--Recommendations to Forward Amendments to the Judicial Conference

A. Summary and Recommendations

At its June 1997 meeting, the Standing Committee approved the publication of proposed amendments to nine rules for public comment from the bench and bar. In response, the Advisory Committee received written comments from 24 persons or organizations commenting on all or some of the Committee's proposed amendments to the rules. In addition, the Committee heard the testimony of four witnesses on the proposed amendments to Rules 11 and 32.2.

The Committee has considered those comments and recommends that all of the proposed amendments be forwarded to the Judicial Conference for approval and transmittal to the Supreme Court. The following discussion briefly summarizes the proposed amendments.

1. ACTION ITEM--Rule 6. Grand Jury.

The Committee has proposed two amendments to Rule 6. The first, in Rule 6(d) would make provision for interpreters in grand jury deliberations; under the current rule, no persons other than the jurors themselves may be present. As originally drafted by the Advisory Committee, the provision for interpreters would have been extended only to interpreters for deaf persons serving on a grand jury. The Standing Committee, however, believed that the limitation as to the kind of interpreter permitted to be present during grand jury deliberations should be removed in order to provide an opportunity for the widest range of public comment on all the issues raised by the presence of an interpreter during those deliberations. Thus, the published amendment extended to any interpreter who may be necessary to assist a grand juror. While some of those commenting on this proposed amendment believed it would be appropriate to include all interpreters, several commentators correctly noted that the amendment as written would be inconsistent with 28 U.S.C. § 1865(b) which requires that all petit and grand jurors must speak English.

The second amendment would change Rule 6(f) regarding the return of an indictment. Under current practice the entire grand jury is required to return the indictment in open court. The proposed change would permit the grand jury foreperson to return the indictment in open court--on behalf of the grand jury. Of the eleven commentators, only two opposed this change on the general view that it distances the grand jury from the court.

Upon further consideration of the amendments to Rule 6(d), the Committee decided to limit the presence of interpreters to those assisting hearing or speech impaired grand jurors.

Recommendation--The Committee recommends that the amendments to Rule 6, as modified following publication, be approved and forwarded to the Judicial Conference.

2. ACTION ITEM--Rule 7. The Indictment and the Information

The amendment to Rule 7(c)(2), which addresses one aspect of criminal forfeiture, is a conforming amendment reflecting proposed new Rule 32.2. That rule provides comprehensive coverage of forfeiture procedures. The Committee received no comments on the proposed amendment to the rule.

Recommendation--The Committee recommends that the amendment to Rule 7 be approved and forwarded to the Judicial Conference.

3. ACTION ITEM--Rule 11. Pleas.

The proposed amendments to Rule 11 reflect the Committee's discussion over the last year concerning the interplay between the sentencing guidelines and plea agreements and the ability of a defendant to waive any attacks on his or her sentence. Specifically, Rule 11(a) has been changed slightly to conform the definition of organizational defendants. Rule 11(c) would be amended to require the trial court to determine if the defendant understands any provision in the plea agreement waiving the right to appeal or to collaterally attack the sentence. A majority of the commentators, and one witness who testified before the Committee, opposed the change. Their general opposition rests on the argument that the Rule should not in any way reflect the Committee's support of such waivers until the Supreme Court has ruled on the question of whether such waivers are valid. The Committee believed that it was appropriate to recognize what is apparently already taking place in a number of jurisdictions and formally require trial judges in those jurisdictions to question the defendant about whether his or her waiver was made knowingly, voluntarily, and intelligently. The Committee did add a disclaimer to the Committee Note, as suggested by at least one commentator.

The proposed change in Rule 11(e)(1) is intended to distinguish clearly between (e)(1)(B) plea agreements--which are not binding on the court--and (e)(1)(C) agreements--which are binding. Other language has been added to those subdivisions to make it clear that a plea agreement may include an agreement as to a sentencing range, sentencing guideline, sentencing factor, or policy statement. The proposed language includes suggested changes by the Subcommittee on Style. The majority of the commentators supported this clarification.

Recommendation--The Committee recommends that the amendments to Rule 11 be approved as published and forwarded to the Judicial Conference.

4. ACTION ITEM--Rule 24(c). Alternate Jurors.

The proposed amendment to Rule 24(c) would permit the trial court to retain alternate jurors--who during the trial have not been selected as substitutes for regular jurors--during the deliberations in case any other regular juror becomes incapacitated and can no longer take part. Although Rule 23 makes provision for returning a verdict with 11 jurors, the Committee believed that the judge should have the discretion in a particular case to retain the alternates, a practice not provided for under the current rule. Most of those commenting on the proposed amendment, supported it. The NADCL and the ABA opposed the change; the former believes that there is no provision for the court to make any substitutions of jurors after deliberations begin. The ABA opposes the amendment because it believes that it will create an unnecessary risk that jurors will decide the case on something less than a thorough evaluation of the evidence. On the other hand, the Magistrate Judges Association supports the change. After considering the comments, the Committee decided to forward the rule with no changes to the published version.

Recommendation--The Committee recommends that the amendment to Rule 24(c) be approved and forwarded to the Judicial Conference.

5. ACTION ITEM--Rule 31. Verdict.

The proposed amendment to Rule 31 deletes subdivision (e) which related to the requirement that the jury return a special verdict regarding criminal forfeiture. The amendment conforms the rule to proposed new Rule 32.2 which provides comprehensive guidance on criminal forfeitures. The Committee received no comments on this proposed change.

Recommendation--The Committee recommends that the amendment to Rule 31 be approved and forwarded to the Judicial Conference.

6. ACTION ITEM--Rule 32. Sentence and Judgment.

The proposed amendment to Rule 32(d), which deals with criminal forfeiture, conforms that provision to proposed new Rule 32.2 which provides

comprehensive guidance on forfeiture procedures. The Committee received no comments on this proposed amendment.

Recommendation--The Committee recommends that the amendment to Rule 32 be approved and forwarded to the Judicial Conference.

7. ACTION ITEM--Rule 32.2. Forfeiture Procedures.

The Committee proposes adoption of a new rule dedicated solely to the question of forfeiture proceedings. Over the last several years the Committee has discussed the jury's role in criminal forfeiture. Under existing rules provisions, when a verdict of guilty is returned on any substantive count on which the government alleges that property may be forfeited, the jury is asked to decide questions of ownership or property interests vis a vis the defendant(s). However, in *Libretti v. United States*, 116 S.Ct. 356 (1995), the Supreme Court indicated that criminal forfeiture constitutes an aspect of the sentence imposed in the case and that the defendant has no constitutional right to have a jury decide any part of the sentence. Accordingly, the Department of Justice recommended adoption of a rule which would leave the issue of criminal forfeiture to the court. In reviewing the various existing rules provisions dealing with criminal forfeiture, the Committee finally settled on proposing one new rule. The adoption of this new rule would require amendments to Rules 7(c)(2), 31(e), 32(d)(2), *supra,* and an amendment to Rule 38(e), *infra.*

The Committee received only six written comments and most of those supported the change. The NADCL adamantly opposes the proposed rule, and provided two witnesses who testified before the Committee. Their key point is that the new rule abrogates the critical right to a jury trial. Under current Rule 31(e), a jury is required to return a special verdict which determines the extent of the defendant's interest in property to be forfeited; and the rules of evidence apply at that proceeding. Under the new rule, the jury's role would be eliminated and the court would initially decide whether the defendant has an interest in the property. In a later proceeding the court would resolve any third party claims to the property subject to forfeiture. A witness for the Department of Justice pointed out that after the Supreme Court's decision is *Libretti*, supra, forfeiture proceedings are a part of sentencing, a matter to be decided by the trial judge.

After reviewing the comments, the Committee recognized that it can be burdensome to the jury which has just returned a verdict following a long trial involving difficult deliberations, to be informed that their task is not yet finished and that they must next decide whether certain property may be forfeited. The

Committee learned that probably as a result, most defendants waive the right to have the jury decide the issue.

After discussion and consideration of the comments and testimony, the Committee made several clarifying changes to the rule regarding (1) the obligation of the trial judge to determine the extent of the defendant's interest in the property to be forfeited, (2) the fact that the ancillary proceeding is not a part of sentencing, and (3) the procedures to be used if the government wishes to use "substitute" property as provided by statute, and procedures to be used if property which was originally part of the order of forfeiture is subsequently discovered.

Recommendation--The Committee recommends that the amendment to Rule 32.2 be approved as amended and forwarded to the Judicial Conference.

8. ACTION ITEM--Rule 38. Stay of Execution.

The amendment to Rule 38 (e) is a technical, conforming, amendment resulting from proposed new Rule 32.2 which provides comprehensive guidance on criminal forfeitures. The Committee received no comments on the proposed change.

Recommendation--The Committee recommends that the amendment to Rule 38 be approved as published and forwarded to the Judicial Conference.

9. ACTION ITEM--Rule 54. Application and Exception.

The proposed amendment to Rule 54 is a minor change reflecting the fact that the Canal Zone court no longer exists. The Committee received only two comments on the amendment; both supported the change.

Recommendation--The Committee recommends that the amendment to Rule 54 be approved as published and forwarded to the Judicial Conference.

B. Text of Proposed Amendments, Summary of Comments and GAP Reports.

Rule 6. The Grand Jury

* * * * *

(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. ~~but no~~ 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.

* * * * *

(f) FINDING AND RETURN OF INDICTMENT. A grand jury may indict ~~An indictment may be found~~ 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 jurors do not vote to indict ~~concur in finding an indictment~~, the foreperson shall so report to a federal magistrate judge

in writing as soon as possible ~~forthwith~~.

COMMITTEE NOTE

Subdivision 6(d). As currently written, Rule 6(d) absolutely bars any person, other than the jurors themselves, from being present during the jury's deliberations and voting. Accordingly, interpreters are barred from attending the deliberations and voting by the grand jury, even though they may have been present during the taking of testimony. The amendment is intended to permit interpreters to assist persons who are speech or hearing impaired and are serving on a grand jury. Although the Committee believes that the need for secrecy of grand jury deliberations and voting is paramount, permitting interpreters to assist hearing and speech impaired jurors in the process seems a reasonable accommodation. *See also United States v. Dempsy*, 830 F.2d 1084 (10th Cir. 1987) (constitutionally rooted prohibition of non-jurors being present during deliberations was not violated by interpreter for deaf petit jury member).

The subdivision has also been restyled and reorganized.

Subdivision 6(f). The amendment to Rule 6(f) is intended to avoid the problems associated with bringing the entire jury to the court for the purpose of returning an indictment. Although the practice is long-standing, in *Breese v. United States*, 226 U.S. 1 (1912), the Court rejected the argument that the requirement was rooted in the Constitution and observed that if there were ever any strong reasons for the requirement, "they have disappeared, at least in part." 226 U.S. at 9. The Court added that grand jury's presence at the time the indictment was presented was a defect, if at all, in form only. *Id.* at 11. Given the problems of space, in some jurisdictions the grand jury sits in a building completely separated from the courtrooms. In those cases, moving the entire jury to the courtroom for the simple process of presenting the indictment may prove difficult and time consuming. Even where the jury is in the same location, having all of the jurors present can be unnecessarily cumbersome in light of the fact that filing of the indictment requires a certification as to how the jurors voted.

The amendment provides that the indictment must be presented either by the jurors themselves, as currently provided for in the rule, or by the foreperson or the deputy foreperson, acting on behalf of the jurors. In an appropriate case, the court might require all of the jurors to be present if it had inquiries about the indictment.

Summary of Comments on Rule 6.

Judge Hayden W. Head, Jr. (CR-001)
U.S. District Judge
Southern District of Texas
Corpus Christi, Texas
September 19, 1998

Judge Head believes that the proposed amendment which would allow for "interpreters" is overly broad and thus contravenes Title 28 U.S.C.A. §1865(b) which requires that all petit and grand jurors be required to speak English. Even if amendment is only for hearing impaired, he does not support it because he is against the introduction of another person into the inner sanctum of the grand jury proceedings. He further objects because he does not support the rule's proposed distinction between jurors and grand jurors.

John Gregg McMaster, Esq. (CR-002)
Attorney at Law
Tompkins and McMaster
Columbia, South Carolina
September 19, 1998

Mr. McMaster finds the proposed rule change "preposterous." He says that it would be a "travesty of justice" to allow someone "to be indicted by a person who does not understand or speak the language of the country or of the indictment." He reasons that is an immigrant's obligation to learn the language of his new country.

Jack E. Horsley, Esq. (CR-003)
Craig & Craig
Matoon, Illinois
September 23, 1997

Mr. Horsley favors the proposed changes to Rule 6.

James W. Evans (CR-005)
Harrisburg, Pennsylvania
September 25, 1997

Mr. Evans states that the proposed changes seem sensible to him.

Judge George P. Kazen (CR-006)
Chief U.S. District Judge

Southern District of Texas
Laredo, Texas
October 7, 1998

Judge Kazen agrees with his colleague Judge Head about the proposed changes to Rule 6(d). He believes that this proposal is incomprehensible because jurors are required to speak and understand English in order to serve as jurors. He concedes that policy consideration support the narrow exception for deaf jurors.

Judge Cornelia G. Kennedy (CR-008)
Circuit Judge
United States Court of Appeals for the Sixth Circuit
Detroit, Michigan
October 21, 1997

Judge Kennedy believes the proposed change to Rule 6(f) which would allow the grand jury foreperson alone to return the indictment will save some time and avoid some inconvenience, but that it will also distance the grand jury from the court. She believes that having the whole grand jury present the indictment to the court allows members to express concerns and ask questions. She says that it is important for the grand jury to know that it is an "adjunct of the court... not merely votes required by the Assistant United States Attorney." Judge Kennedy also states that grand jury rooms should be in the court house. When they are not, she notes, it is even more important for the members of the grand jury to go before the court and be reminded of their function.

Judge Donald C. Ashmanskas (CR-010)
United States Magistrate Judge
United States District Court for the District of Oregon
Portland, Oregon
October 29, 1997

Magistrate Ashmanskas suggests specific amendments to Rule 6(f). He suggests that the name "presiding grand juror" be substituted for the proposed rule's moniker, "foreperson," and "deputy presiding grand juror" instead of "deputy foreperson." He also suggests that the indictments be permitted to be filed with district clerk, rather than before a magistrate or judge in open court. As an alternative, he suggests that the indictment be returned to a magistrate or district court judge. In a post script, he notes that he would favor a reduction in the size of the grand jury. He notes that in Oregon the grand jury is composed of seven people and five must concur for an indictment to be returned.

Magistrate Judge Richard P. Mesa (CR-018)
United States Magistrate Judge
Western District of Texas
El Paso, Texas
February 2, 1998

Judge Mesa wholeheartedly supports the proposed changes to Rule 6(f) because the practical result will be that grand jurors will be able to leave the court house at a reasonable hour.

Carol A. Brook (CR-021a)
Chicago, Illinois
William J. Genego
Santa Monica, California
Peter Goldberger
Ardmore, Pennsylvania
Co-Chairs, National Association of Criminal Defense Lawyers
Committee on Rules of Procedure
February 15, 1998

The NACDL believes that the proposal to Rule 6(a) which would allow interpreters into grand jury proceedings should not be adopted at this time because it would not be consistent with 28 U.S.C. §1865 (b) (2,3,4). The NACDL opposes the proposed amendment to Rule 6(f) which would allow the grand jury foreperson to return the indictment alone. They believe that having all of the grand jurors present when an indictment is returned reminds the grand jurors that they are an extension of the court and independent from the prosecutor and make the jurors take the process more seriously. The NACDL concludes by asserting that the "salutary purposes served by Rule 6(f) outweigh whatever minor inconveniences and administrative problems may be encountered in achieving them."

David Long, Dir. of Research (CR-023)
Criminal Law Section, State Bar of California
San Francisco, CA
March 18, 1998

The Criminal Law Executive Committee of the California State Bar supports the proposed amendments to Rule 6. It opines that if an interpreter will assist a grand juror, that person's presence should be permitted. And it believes that permitting the foreperson or deputy foreperson to return the indictment may avoid further impingement on the grand jurors time.

Federal Magistrate Judges Association (CR-024)

Hon. Tommy Miller, President
United States Magistrate Judge
February 2, 1998

The Association supports the amendments to Rule 6. It recommends that a statement be added to the Committee Note to remind interpreters of the need for confidentiality.

GAP Report--Rule 6.

The Committee modified Rule 6(d) to permit only interpreters assisting hearing or speech impaired grand jurors to be present during deliberations and voting.

Rule 7. The Indictment and the Information

(c) NATURE AND CONTENTS.

(2) *Criminal Forfeiture*. No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information ~~shall allege the extent of the interest or property subject to forfeiture~~ alleges that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute.

* * * * *

COMMITTEE NOTE

The rule is amended to reflect new rule 32.2 which now governs criminal forfeiture procedures.

Summary of Comments on Rule 7.

The Committee received no written comments on the proposed amendment to Rule 7.

GAP Report--Rule 7

The Committee made no changes to the published draft of the Rule 7 amendment.

Rule 11. Pleas

(a) ALTERNATIVES.

(1) *In General.* A defendant may plead ~~not~~ guilty, not guilty, or nolo contendere. If a defendant refuses to plead, or if a defendant ~~corporation~~ organization, as defined in 18 U.S.C. § 18, fails to appear, the court shall enter a plea of not guilty.

* * * * *

(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:

* * * * *

(6) the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence.

* * * * *

(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 ~~engage in discussions with a view toward reaching an agreement~~ that, upon the defendant's entering ~~of~~ a plea of guilty or nolo contendere to a charged offense, or to a lesser or related offense, the attorney for the government will: ~~do any of the following:~~

(A) move to dismiss ~~for dismissal of~~ other charges; or

(B) recommend, ~~make a recommendation,~~ or agree not to oppose the defendant's request, ~~for~~ 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 ~~with the understanding that such~~ recommendation or request is ~~shall~~ not ~~be~~ binding on ~~upon~~ 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 ~~such~~ discussions between the parties concerning any such plea agreement.

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COMMITTEE NOTE

Subdivision (a). The amendment deletes use of the term "corporation" and substitutes in its place the term "organization," with a reference to the definition of that term in 18 U.S.C. § 18.

Subdivision (c)(6). Rule 11(c) has been amended specifically to reflect the increasing practice of including provisions in plea agreements which require the defendant to waive certain appellate rights. The increased use of such provisions is due in part to the increasing number of direct appeals and collateral reviews challenging sentencing decisions. Given the increased use of such provisions, the Committee believed it was important to insure that first, a complete record exists regarding any waiver provisions, and second, that the waiver was voluntarily and knowingly made by the defendant. Although a number of federal courts have approved the ability of a defendant to enter into such waiver agreements, the Committee takes no position on the underlying validity of such waivers.

Subdivision (e). Amendments have been made to Rule 11(e)(1)(B) and (C) to reflect the impact of the Sentencing Guidelines on guilty pleas. Although Rule 11 is generally silent on the subject, it has become clear that the courts have struggled with the subject of guideline sentencing vis a vis plea agreements, entry and timing of guilty pleas, and the ability of the defendant to withdraw a plea of guilty. The amendments are intended to address two specific issues.

First, both subdivisions (e)(1)(B) and (e)(1)(C) have been amended to recognize that a plea agreement may specifically address not only what amounts to an appropriate sentence, but also a sentencing guideline, a sentencing factor, or a policy statement accompanying a sentencing guideline or factor. Under an (e)(1)(B) agreement, the government, as before, simply agrees to make a recommendation to the court, or agrees not to oppose a defense request concerning a particular sentence or consideration of a sentencing guideline, factor, or policy statement. The amendment makes it clear that this type of agreement is not binding on the court. Second, under an (e)(1)(C) agreement, the government and defense have actually agreed on what amounts to an appropriate sentence or have agreed to one of the specified components. The amendment also makes it clear that this agreement is binding on the court once the court accepts it. As is the situation under the current Rule, the court retains absolute discretion whether to accept a plea agreement.

Summary of Comments on Rule 11.

Jack E. Horsley, Esq. (CR-003)
Craig & Craig
Matoon, Illinois
September 23, 1997

Mr. Horsley favors the proposed changes.

Judge Paul D. Borman (CR-004)
United States District Judge
United States District Court for the Eastern District of Michigan
Detroit, Michigan
September 24, 1997

Judge Borman submitted a request to testify in testifying about proposed amendments to Rule 11. He does not express an opinion on the proposed amendments.

James W. Evans (CR-005)
Harrisburg, Pennsylvania
September 25, 1997

Mr. Evans summarily states that the proposed changes seem sensible to him.

Judge George P. Kazen (CR-006)
Chief U.S. District Judge
Southern District of Texas
Laredo, Texas
October 7, 1998

Judge Kazen states that the proposed changes to Rule 11 appear to be helpful. He notes that the Committee has still not addressed the problem of Rule 11(e)(4) and the problem of rejected plea agreements and the defendant's opportunity to withdraw a plea.

Judge Malcolm F. Marsh (CR-009)
United States District Judge
United States District Court for the District of Oregon
Portland, Oregon
October 21, 1997

Judge Marsh is opposed to the proposed amendment to Rule 11(e)(1)(C). He is concerned with allowing parties to agree to a specific

sentencing range. He fears that this practice will allow parties to agree to offense characteristics regardless of the actual facts of the as found in the Pre-Sentencing Report. He notes that the primary danger is allowing parties to bind the court to certain facts, thus taking away more of the court's discretionary authority and shifting it to the prosecutor's office.

Thomas W. Hillier, II (CR-012)
Chair, Legislative Subcommittee
Federal Public Defender
Western District of Washington
Seattle, Washington
December 5, 1997

Mr. Thomas Hillier, Chair, Legislative Subcommittee of the Federal Public Defender, opposes the proposed amendments Rule 11(c) concerning a defendant's waiver of rights to appeal. He first commends the general purpose of ensuring knowing, voluntary appeal waivers. But, he "strongly disfavors" the proposal. He notes in his initial remarks that if the Committee does go forward with the proposed amendments, the Federal Public Defenders urge cautionary language in the notes that emphasizes the problems associated with appeal waivers. Mr. Hillier cites *United States v. Melancon*, 972 F.2d 566, 569-580 (5th Cir. 1992) for its arguments against appeal waivers. He attaches an article which identifies other judges who believe that appeal waivers should not be used. Mr. Hillier believes that the proposed amendment is premature and states that the Committee should not go forward with any proposal on this issue until the courts have had an opportunity to review all of the problems that appeal waivers present. He notes that the Supreme Court will eventually decide the issue.

Judge Paul L. Friedman (CR-016)
United States District Judge
United States District Court for the District Court of Columbia
Washington, D.C.
January 5, 1998

Judge Friedman is opposed to the proposed changes to Rule 11. He opposes the amendment because in his view there can be no valid waiver of such appellate rights and that the proposed amendment would suggest that such waivers are lawful. He encloses his opinion in *United States v. Raynor*, Crim. No. 97-186 (D.D.C. Dec. 29, 1997) and a copy of Judge Greene's opinion in *United States v. Johnson*, Crim. No. 97-305 (D.D.C. August 8, 1997), to support his position.

Mr. Kenneth Laborde (CR-017)
Chief Probation Officer
Eastern District of Texas
Beaumont, Texas
January 26, 1998

Mr. Laborde is opposed to the proposed changes to Rule 11(e)(1)(C). His primary concern is that a defendant's sentence may be determined by prosecutors and defense counsel before the probation officer has an opportunity to conduct a pre-sentence investigation and apply the sentencing guidelines. He is also concerned that parties "may be tempted to circumvent the guidelines" in order to avoid trial. He emphasizes that the proposed changes to the Rule would deprive the court of probation officers' expertise in this area. Finally, he writes that the intended result of fewer appeals would occur, but that the quality of justice will suffer, and this is too great a cost.

Magistrate Judge Richard P. Mesa (CR-018)
United States Magistrate Judge
Western District of Texas
El Paso, Texas
February 2, 1998

Judge Mesa supports the changes to Rule 11(c) because he anticipates that "many problems and questionable petitions" will be avoided.

Richard A. Rossman (CR-019)
Chairperson, Standing Committee on United States Courts of the State Bar of Michigan
Detroit, Michigan
February 9, 1998

On behalf of the Standing Committee on United States Courts of the State Bar of Michigan, Mr. Rossman, the chair, indicates that his committee is "unanimous in its opposition to the proposed amendment to Rule 11(c)(6). First, the committee believes that waiver provisions have no place in plea agreements and secondly, there is no need to highlight any particular provision in the agreement. Finally, a colloquy itself might raise confusion or inadequate explanations regarding the provision. It has no objection to the other amendments proposed for Rule 11.

Mr. Robert Ritchie (CR-020)
Chairman, Federal Criminal Procedures Committee,
American College of Trial Lawyers

Knoxville, Tennessee\
February 11, 1998

Mr. Ritchie writes on behalf of the American College of Trial Lawyers and is opposed to the proposed changes of Rule 11(c)(6) because the changes would institutionalize the practice of requiring criminal defendants to waive rights of appeal and collateral attack of illegal sentences. He notes that "Rule 11(e)(1)(c) already allows agreed-to sentences, which is an appropriate procedure through which to ensure that a sentencing appeal is unnecessary." He states that the proposed practice violates the Due Process Clause because the waiver would not be knowing, voluntary and intelligent when a sentence has not yet been imposed. In support of his rationale he cites *United States v. Johnson*, written by District Court Judge Green (see, *supra*, Judge Friedman) and *United States v. Melancon*, 972 F.2d 566, 570-580 (5th Cir. 1992).

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Committee on Rules of Procedure
February 15, 1998

The NACDL strongly oppose the proposed amendment to Rule 11(c)(6) on both procedural and substantive grounds. The NACDL recognizes the purpose of the amendment is to ensure that defendants who are waiving their appellate rights are doing so knowingly. But it believes that this proposed change would signal the Judicial Conference's approval of appeal waivers. The NACDL states that appeal waivers are "so inherently coercive and unfair that they should not be tolerated in our system of justice." The NACDL believes that the amendment is premature because it puts the Committee in the position of making law. This is true in large part, the NACDL notes, because the courts of this country have reached consensus on whether or not appeal waivers are constitutionally permissible. The NACDL also believes that the amendment is premature because the courts do not agree on what an appeal waiver means. The NACDL notes that even courts who accept this practice disagree on what may be waived. The NACDL expresses its support of the opinion of District Court Judge Friedman and Green in *United States v. Raynor*, Crim. No. 97-186 (D.D.C. Dec. 29, 1997) and *United States v. Johnson*, Crim. No. 97-305 (D.D.C. August 8, 1997). The NACDL states that appeal

waivers violate the constitution, violate public policy and invite, and encourage illegal sentences where both parties to an agreement no that their practices will not be subject to review.

Professor Bruce Comly French (CR-022)
Honorable Barbara Jones
Co-Chaipersons
ABA Criminal Justice Section
Committee on Rules of Evidence and Criminal Procedure
Washington, D.C.
February 17, 1998

The ABA supports the proposed change to rule 11(c)(6) that would make a defendant aware of the waiver of any appellate rights. The ABA urges the Committee to consider ABA Standard for Criminal Justice 14.1.4(c) that encourages the court to make the defendant aware of possible collateral consequences of pleading guilty. However, the ABA opposes the proposal to change the second sentence of Rule 11(e)(1)(C) because it mandates the court acceptance of a plea binds the court to specific sentencing ranges. The ABA generally supports the third sentence of (e)(1)(C) that would prohibit court participation in any discussions between the parties concerning plea agreements. However, it notes that ABA Standard 14-3.3 would permit the parties upon agreement to seek the judge's opinion about the acceptability of certain plea agreements.

David Long, Dir. of Research (CR-023)
Criminal Law Section, State Bar of California
San Francisco, CA
March 18, 1998

The Criminal Law Executive Committee of the California State Bar supports the amendments to Rule 11. Specifically, it believes that requiring judges to determine the defendant's understanding of a waiver provision will ensure that the defendant knows what rights he or she is waiving. The Committee also believes that the amendments to Rule 11(e) reflect the current practice of agreeing to guideline ranges or factors.

Federal Magistrate Judges Association (CR-024)
Hon. Tommy Miller, President
United States Magistrate Judge
February 2, 1998

The Association supports the proposed amendments to Rule 11.

They view the amendments as neither significant nor controversial. Instead, they note, the proposed changes "represent incremental improvements of the rule that clarify its meaning, make it work more effectively with other statutes or regulations, and bring it into conformity with evolving practice."

Summary of Testimony--Rule 11

Judge Paul D. Borman
United States District Judge
United States District Court for the Eastern District of Michigan
Detroit, Michigan
Testified--April 27, 1998

Testifying before the Committee, Judge Borman expressed strong disagreement with the proposed amendment to Rule 11(c)(6). He believed that requiring the defendant to waive the right to appeal a sentence is not permitted and violates the very spirit of the Sentencing Guidelines. He was particularly concerned that the amendment would signal the Advisory Committee's approval of such waivers, which have not been ruled upon by the Supreme Court.

GAP Report--Rule 11.

The Committee made no changes to the published draft amendments to Rule 11. But it did add language to the Committee Note which reflects the view that the amendment is not intended to signal its approval of the underlying practice of including waiver provisions in pretrial agreements.

Rule 24. Trial Jurors

* * * * *

(c) ALTERNATE JURORS.

(1) *In General.* The court may empanel no ~~direct that not~~ more

than 6 jurors, in addition to the regular jury, ~~be called and impanelled~~ to sit as alternate jurors. An alternate juror, ~~Alternate jurors~~ in the order ~~in which they are~~ called, shall replace a juror ~~jurors~~ who, ~~prior to the time the jury retires to consider its verdict,~~ becomes or is found ~~become or are found~~ to be unable or disqualified to perform juror ~~their~~ duties. Alternate jurors shall (i) be drawn in the same manner, ~~shall~~ (ii) have the same qualifications, ~~shall~~ (iii) be subject to the same examination and challenges, and ~~shall~~ (iv) take the same oath as regular jurors. An alternate juror has ~~and shall have~~ the same functions, powers, facilities and privileges as a regular juror. ~~the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.~~

(2) *Peremptory Challenges.* In addition to challenges otherwise provided by law, each ~~Each~~ side is entitled to 1 additional peremptory challenge ~~in addition to those otherwise allowed by law~~ if 1 or 2 alternate jurors are empaneled ~~to be impanelled~~, 2 additional peremptory challenges if 3 or 4 alternate jurors are ~~to be~~ empaneled ~~impanelled~~, and 3 additional peremptory challenges if 5 or 6 alternate jurors are empaneled ~~to be impanelled~~. The additional peremptory challenges may be used to remove ~~against~~ an alternate juror only, and the other peremptory challenges allowed by these rules may not be used to remove ~~against~~ an alternate juror.

(3) *Discharge*. 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 regular juror during deliberations.

COMMITTEE NOTE

As currently written, Rule 24(c) explicitly requires the court to discharge all of the alternate jurors--who have not been selected to replace other jurors--when the jury retires to deliberate. That requirement is grounded on the concern that after the case has been submitted to the jury, its deliberations must be private and inviolate. *United States v. Houlihan*, 92 F.3d 1271, 1285 (1st Cir. 1996), *citing United States v. Virginia Election Corp.*, 335 F.2d 868, 872 (4th Cir. 1964).

Rule 23(b) provides that in some circumstances a verdict may be returned by eleven jurors. In addition, there may be cases where it is better to retain the alternates when the jury retires, insulate them from the deliberation process, and have them available should one or more vacancies occur in the jury. That might be especially appropriate in a long, costly, and complicated case. To that end the Committee believed that the court should have the discretion to decide whether to retain or discharge the alternates at the time the jury retires to deliberate and to use Rule 23(b) to proceed with eleven jurors or to substitute a juror or jurors with alternate jurors who have not been discharged.

In order to protect the sanctity of the deliberative process, the rule requires the court to take appropriate steps to insulate the alternate jurors. That may be done, for example, by separating the alternates from the deliberating jurors and instructing the alternate jurors not to discuss the case with any other person until they replace a regular juror. *See, e.g.*, *United States v. Olano*, 507 U.S. 725 (1993) (not plain error to permit alternate jurors to sit in during deliberations); *United States v. Houlihan*, 92 F.3d 1271, 1286-88 (1st Cir. 1996) (harmless error to retain alternate jurors in violation of Rule 24(c); in finding harmless error the court cited the steps taken by the trial judge to insulate the alternates). If alternates are

used, the jurors must be instructed that they must begin their deliberations anew.

Finally, subsection (c) has been reorganized and restyled.

Summary of Comments on Rule 24(c).

Jack E. Horsley, Esq. (CR-003)
Craig & Craig
Matoon, Illinois
September 23, 1997
Mr. Horsley favors the proposed changes.

James W. Evans (CR-005)
Harrisburg, Pennsylvania
September 25, 1997
Mr. Evans states that the proposed changes seem sensible to him.

Prentice H. Marshall (CR-011)
Ponce Inlet, Florida
November 14, 1997
Mr. Marshall is very much in favor of the proposed amendment to Rule 24(c) which would allow district judges to retain alternate jurors during deliberations so that they may be substituted for juror who becomes incapacitated during deliberations. He is not opposed to any of the proposed changes.

Carol A. Brook (CR-021a)
Chicago, Illinois
William J. Genego
Santa Monica, California
Peter Goldberger
Ardmore, Pennsylvania
Co-Chairs, National Association of Criminal Defense Lawyers
Committee on Rules of Procedure
February 15, 1998
The NACDL urges that the proposed amendment not be adopted because at the present time there is no provision which would allow an alternate juror to replace a regular juror after deliberations have commenced. It notes that if the Committee's intent is to enable alternates to replace jurors during deliberations, the Committee should propose an

amendment which says so forthrightly.

Professor Bruce Comly French (CR-022)
Honorable Barbara Jones
Co-Chaipersons
ABA Criminal Justice Section
Committee on Rules of Evidence and Criminal Procedure
Washington, D.C.

The ABA opposes the proposed change to Rule 24(c) that allows for the retention of alternate jurors once jury deliberations begin. Quoting ABA Standard for Criminal Justice 15-2.9 it notes that allowing this practice increases risks of the jury returning a verdict based on "a less than thorough evaluation of the evidence."

Federal Magistrate Judges Association (CR-024)
Hon. Tommy Miller, President
United States Magistrate Judge
February 2, 1998

The Association supports the proposed amendments to Rule 24. It agrees that providing the trial court with the option of retaining the alternate jurors may be an appropriate alternative, especially in long and complicated cases.

GAP Report--Rule 24(c).

Rule 31. Verdict

* * * * *

~~(e) CRIMINAL FORFEITURE. If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any.~~

COMMITTEE NOTE

The rule is amended to reflect the creation of new rule 32.2 which now governs criminal forfeiture procedures.

Summary of Comments on Rule 31

The Committee received no written comments on the proposed change to Rule 31.

GAP Report--Rule 31

The Committee made no changes to the published draft amendment to Rule 31.

Rule 32. Sentence and Judgment

* * * * *

(d) JUDGMENT.

* * * * *

(2) *Criminal Forfeiture*. Forfeiture procedures are governed by Rule 32.2. ~~If a verdict contains a finding that property is subject to criminal forfeiture, or if a defendant enters a guilty plea subjecting property to such forfeiture, the court may enter a preliminary order of forfeiture after providing notice to the defendant and a reasonable opportunity to be heard on the timing and form of the order. The order of forfeiture shall authorize the Attorney General to seize the property subject to forfeiture, to conduct any discovery that the court considers proper to help identify, locate, or dispose of the property, and to begin proceedings consistent with any statutory requirements pertaining to ancillary hearings~~

~~and the rights of third parties. At sentencing, a final order of forfeiture shall be made part of the sentence and included in the judgment. The court may include in the final order such conditions as may be reasonably necessary to preserve the value of the property pending any appeal.~~

* * * * *

COMMITTEE NOTE

The rule is amended to reflect the creation of new rule 32.2 which now governs criminal forfeiture procedures.

Summary of Comments on Rule 32.

The Committee received no comments on the proposed conforming amendment to Rule 32(d).

GAP Report--Rule 32.

The Committee made no changes to the published draft.

32.2. Criminal Forfeiture

(a) *INDICTMENT OR INFORMATION.* No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or information alleges that a defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute.

(b) *HEARING AND ORDER OF FORFEITURE.*

(1) As soon as practicable after entering a guilty verdict or accepting a plea of guilty or nolo contendere on any count in the

indictment or information for which criminal forfeiture is alleged, the court shall determine what property is subject to forfeiture because it is related to the offense. The determination may be based on evidence already in the record, including any written plea agreement, or on evidence adduced at a post trial hearing. If the property is subject to forfeiture, the court shall enter a preliminary order directing the forfeiture of whatever interest each defendant may have in the property, without determining what that interest is. Deciding the extent of each defendant's interest is deferred until any third party claiming an interest in the property has petitioned the court to consider the claim.

(2) If no third party petition as provided in (b)(1) is timely filed, the court shall determine whether the property should be forfeited in whole or in part depending on the extent of the defendant's interest in the property. The determination may be made at any time before the order of forfeiture becomes final under subdivision (c), and may be based on evidence already in the record, including a written plea agreement, or evidence submitted by the government in a motion for entry of a final order of forfeiture. The defendant may not object to the entry of the final order of forfeiture on the ground that the property belongs, in whole, or in part, to a

co-defendant or a third party. If the court determines that the defendant, or any combination of co-defendants, were the only persons with a legal interest (or in the case of illegally obtained property, a possessory interest) in the property, the court shall enter a final order forfeiting the property in its entirety. If the court determines that the defendant or combination of co-defendants, had a legal interest (or in the case of illegally obtained property, a possessory interest) in only a portion of the property, the court shall enter a final order forfeiting the property to the extent of the defendant's or defendants' interest.

(3) When the court enters a preliminary order of forfeiture, the Attorney General may seize the property subject to forfeiture; conduct any discovery as the court considers proper in identifying, locating or disposing of the property; and commence proceedings consistent with any statutory requirements pertaining to third-party rights. At sentencing—or at any time before sentencing if the defendant consents—the order of forfeiture becomes final as to the defendant and shall be made a part of the sentence and included in the judgment. The court may include in the order of forfeiture whatever conditions are reasonably necessary to preserve the property's value pending any appeal.

(c) *ANCILLARY PROCEEDING.*

(1) If, as prescribed by statute, a third party files a petition asserting an interest in the forfeited property, the court shall conduct an ancillary proceeding.

(i) The court may consider a motion to dismiss the petition for lack of standing, for failure to state a claim upon which relief can be granted, or for any other ground. For purposes of the motion, the facts set forth in the petition are assumed to be true.

(ii) If a Rule 32.2(c)(1) motion to dismiss is denied, or not made, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure to the extent that the court determines such discovery to be necessary or desirable to resolve factual issues before conducting an evidentiary hearing. After discovery ends, either party may ask the court to dispose of the petition on a motion for summary judgment in the manner described in Rule 56 of the Federal Rules of Civil Procedure.

(2) After the ancillary proceeding, the court shall enter a final order of forfeiture amending the preliminary order as necessary

to account for the disposition of any third-party petition.

(3) If multiple petitions are filed in the same case, an order dismissing or granting fewer than all of the petitions is not appealable until all petitions are resolved, unless the court determines that there is no just reason for delay and directs the entry of final judgment on one or more but fewer than all of the petitions.

(4) The ancillary proceeding is not considered a part of sentencing.

(d) *STAY OF FORFEITURE PENDING APPEAL.* If the defendant appeals from the conviction or order of forfeiture, the court may stay the order of forfeiture upon terms that the court finds appropriate to ensure that the property remains available in case the conviction or order of forfeiture is vacated. The stay will not delay the ancillary proceeding or the determination of a third party's rights or interests. If the defendant's appeal is still pending when the court determines that the order of forfeiture shall be amended to recognize a third party's interest in the property, the court shall amend the order of forfeiture but shall refrain from directing the transfer of any property or interest to the third party until the defendant's appeal is final, unless the defendant consents in writing, or on the record, to the transfer of the property or interest to the third party.

(e) *SUBSEQUENTLY LOCATED PROPERTY; SUBSTITUTE PROPERTY.*

(1) The court, on motion by the government, may at any time enter an order of forfeiture—or amend an existing order of forfeiture—to include property which:

(i) is subject to forfeiture under an existing order of forfeiture and was located and identified after that order of forfeiture was entered; or

(ii) is substitute property which qualifies for forfeiture under an applicable statute.

(2) If the government makes the requisite showing that the property is subject to forfeiture under either (e)(1)(i) or (e)(1)(ii), the court shall:

(i) enter an order forfeiting the property, or amend an existing preliminary or final order to include that property;

(ii) if a third party files a petition with the court, conduct an ancillary proceeding under subdivision (c) as to the property; and

(iii) if no third party files a petition, enter an order forfeiting the property under subdivision (b)(2).

COMMITTEE NOTE

Rule 32.2 consolidates a number of procedural rules governing the forfeiture of assets in a criminal case. Existing Rules 7(c)(2), 31(e) and 32(d)(2) are also amended to conform to the new rule. In addition, the forfeiture-related provisions of Rule 38(e) are stricken.

Subsection (a). Subsection (a) is derived from Rule 7(c)(2) which provides that notwithstanding statutory authority for the forfeiture of property following a criminal conviction, no forfeiture order may be entered unless the defendant was given notice of the forfeiture in the indictment or information. As courts have held, subsection (a) is not intended to require that an itemized list of the property to be forfeited appear in the indictment or information itself; instead, such an itemization may be set forth in one or more bills of particulars. *See United States v. Moffitt, Zwerling & Kemler, P.C.*, 83 F.3d 660, 665 (4th Cir. 1996), *aff'g* 846 F. Supp. 463 (E.D. Va. 1994) (*Moffitt* I) (indictment need not list each asset subject to forfeiture; under Rule 7(c), this can be done with bill of particulars). *See United States v. Voight*, 89 F.3d 1050 (3rd Cir. 1996) (court may amend order of forfeiture at any time to include substitute assets).

Subsection (b) Subsection (b) replaces Rule 31(e) which provides that the jury in a criminal case must return a special verdict "as to the extent of the interest or property subject to forfeiture." *See United States v. Saccoccia*, 58 F.3d 754 (1st Cir. 1995) (Rule 31(e) only applies to jury trials; no special verdict required when defendant waives jury right on forfeiture issues). After the Rule was promulgated in 1972, changes in the law created several problems.

The first problem concerns the role of the jury. When Rule 31(e) was promulgated, it was assumed that criminal forfeiture was akin to a separate criminal offense on which evidence would be presented and the jury would have to return a verdict. In *Libretti v. United States*, 116 S. Ct. 356 (1995), however, the Supreme Court held that criminal forfeiture constitutes an aspect of the sentence imposed in a criminal case and that the defendant has no constitutional right to have the jury determine any part of the forfeiture. The special verdict requirement in Rule 31(e), the Court said, is in the nature of a statutory right that can be modified or repealed at any time.

Even before *Libretti*, lower courts had determined that criminal forfeiture is a sentencing matter and concluded that criminal trials therefore should be bifurcated so that the jury first returns a verdict on guilt or innocence and then returns to hear evidence regarding the forfeiture. In the second part of the bifurcated proceeding, the jury is instructed that the government must establish the forfeitability of the property by a preponderance of the evidence. *See United States v. Myers*, 21 F.3d 826

(8th Cir. 1994) (preponderance standard applies because criminal forfeiture is part of the sentence in money laundering cases); *United States v. Voight*, 89 F.3d 1050 (3rd Cir. 1996) (following *Myers*); *United States v. Smith*, 966 F.2d 1045, 1050-53 (6th Cir. 1992) (same for drug cases); *United States v. Bieri*, 21 F.3d 819 (8th Cir. 1994) (same).

Traditionally, juries do not have a role in sentencing other than in capital cases, and elimination of that role in criminal forfeiture cases would streamline criminal trials. Undoubtedly, it may be confusing for a jury to be instructed regarding a different standard of proof in the second phase of the trial, and it is burdensome to have to return to hear additional evidence after what may have been a contentious and exhausting period of deliberation regarding the defendant's guilt or innocence.

For these reasons, the proposal replaces Rule 31(e) with a provision that requires the court alone, as soon as practicable after the verdict in the criminal case, to hold a hearing to determine if the property was subject to forfeiture, and to enter a preliminary order of forfeiture.

The second problem with Rule 31(e) concerns the scope of the determination that must be made prior to entering an order of forfeiture. This issue is the same whether the determination is made by the court or by the jury.

As mentioned, the current Rule requires the jury to return a special verdict "as to the extent of the interest or property subject to forfeiture." Some courts interpret this to mean only that the jury must answer "yes" or "no" when asked if the property named in the indictment is subject to forfeiture under the terms of the forfeiture statute--*e.g.* was the property used to facilitate a drug offense? Other courts also ask the jury if the defendant has a legal interest in the forfeited property. Still other courts, including the Fourth Circuit, require the jury to determine the *extent* of the defendant's interest in the property vis a vis third parties. *See United States v. Ham*, 58 F.3d 78 (4th Cir. 1995) (case remanded to the district court to empanel a jury to determine, in the first instance, the extent of the defendant's forfeitable interest in the subject property).

The notion that the "extent" of the defendant's interest must be established as part of the criminal trial is related to the fact that criminal forfeiture is an *in personam* action in which only the defendant's interest in the property may be forfeited. *United States v. Riley*, 78 F.3d 367 (8th Cir. 1996). When the criminal forfeiture statutes were first enacted in the 1970's, it was clear that a forfeiture of property other than the defendant's could not occur in a criminal case, but there was no mechanism designed to limit the forfeiture to the defendant's interest. Accordingly, Rule 31(e) was drafted to make a determination of the "extent" of the defendant's interest part of the verdict.

The problem, of course, is that third parties who might have an interest in the forfeited property are not parties to the criminal case. At the

same time, a defendant who has no interest in property has no incentive, at trial, to dispute the government's forfeiture allegations. Thus, it was apparent by the 1980's that Rule 31(e) was an inadequate safeguard against the inadvertent forfeiture of property in which the defendant held no interest.

In 1984, Congress addressed this problem when it enacted a statutory scheme whereby third party interests in criminally forfeited property are litigated by the court in an ancillary proceeding following the conclusion of the criminal case and the entry of a preliminary order of forfeiture. *See* 21 U.S.C. § 853(n); 18 U.S.C. § 1963(l). Under this scheme, the court orders the forfeiture of the defendant's interest in the property--whatever that interest may be--in the criminal case. At that point, the court conducts a separate proceeding in which all potential third party claimants are given an opportunity to challenge the forfeiture by asserting a superior interest in the property. This proceeding does not involve relitigation of the forfeitability of the property; its only purpose is to determine whether any third party has a legal interest in the property such that the forfeiture of the property from the defendant would be invalid.

The notice provisions regarding the ancillary proceeding are equivalent to the notice provisions that govern civil forfeitures. *Compare* 21 U.S.C. § 853(n)(1) *with* 19 U.S.C. § 1607(a); *see United States v. Bouler*, 927 F. Supp. 911 (W.D.N.C. 1996) (civil notice rules apply to ancillary criminal proceedings). Notice is published and sent to third parties who have a potential interest. *See United States v. BCCI Holdings (Luxembourg) S.A. (In re Petition of Indosuez Bank)*, 916 F. Supp. 1276 (D.D.C. 1996) (discussing steps taken by government to provide notice of criminal forfeiture to third parties). If no one files a claim, or if all claims are denied following a hearing, the forfeiture becomes final and the United States is deemed to have clear title to the property. 21 U.S.C. § 853(n)(7); *United States v. Hentz*, 1996 WL 355327 (E.D. Pa. 1996) (once third party fails to file a claim in the ancillary proceeding, government has clear title under § 853(n)(7) and can market the property notwithstanding third party's name on the deed).

Thus, the ancillary proceeding has become the forum for determining the extent of the defendant's forfeitable interest in the property. It allows the court to conduct a proceeding in which all third party claimants can participate and which ensures that the property forfeited actually belongs to the defendant.

Since the enactment of the ancillary proceeding statutes, the requirement in Rule 31(e) that the court (or jury) determine the extent of the defendant's interest in the property as part of the criminal trial has become an unnecessary anachronism that leads more often than not to duplication and a waste of judicial resources. There is no longer any reason to delay the conclusion of the criminal trial with a lengthy hearing over the extent of the defendant's interest in property when the same issues

will have to be litigated a second time in the ancillary proceeding if someone files a claim challenging the forfeiture. For example, in *United States v. Messino*, 921 F. Supp. 1231 (N.D. Ill. 1996), the court allowed the defendant to call witnesses to attempt to establish that they, not he, were the true owners of the property. After the jury rejected this evidence and the property was forfeited, the court conducted an ancillary proceeding in which the same witnesses litigated their claims to the same property.

A more sensible procedure would be for the court, once it determines that property was involved in the criminal offense for which the defendant has been convicted, to order the forfeiture of whatever interest a defendant may have in the property without having to determine exactly what that interest is. If third parties assert that they have an interest in all or part of the property, those interests can be adjudicated at one time in the ancillary proceeding.

This approach would also address confusion that occurs in multi-defendant cases where it is clear that each defendant should forfeit whatever interest he may have in the property used to commit the offense, but it is not at all clear which defendant is the actual owner of the property. For example, suppose A and B are co-defendants in a drug and money laundering case in which the government seeks to forfeit property involved in the scheme that is held in B's name but of which A may be the true owner. It makes no sense to invest the court's time in determining which of the two defendants holds the interest that should be forfeited. Both defendants should forfeit whatever interest they may have. Moreover, to the extent that the current rule forces the court to find that A is the true owner of the property, it gives B the right to file a claim in the ancillary proceeding where he may attempt to recover the property despite his criminal conviction. *United States v. Real Property in Waterboro*, 64 F.3d 752 (lst Cir. 1995) (co-defendant in drug/money laundering case who is not alleged to be the owner of the property is considered a third party for the purpose of challenging the forfeiture of the other co-defendant's interest).

The new Rule resolves these difficulties by postponing the determination of the extent of the defendant's interest until the ancillary proceeding. As provided in (b)(1), the court, as soon as practicable after the verdict in the criminal case, would determine if the property was subject to forfeiture in accordance with the applicable statute, e.g., whether the property represented the proceeds of the offense, was used to facilitate the offense, or was involved in the offense in some other way. The determination could be made by the court alone based on the evidence in the record from the criminal trial or the facts set forth in a written plea agreement submitted to the court at the time of the defendant's guilty plea, or the court could hold a hearing to determine if the requisite relationship existed between the property and the offense. It would not be necessary to determine at this stage what interest any defendant might have in the property. Instead, the court would order the forfeiture of whatever interest each defendant might have in the property and conduct the ancillary proceeding.

If someone files a claim, the court would determine the respective interests of the defendants versus the third party claimants and amend the order of forfeiture accordingly. On the other hand, as recognized in (b)(2), if no one files a claim in the ancillary proceeding, the court would make a finding as to the extent of the defendant's interest in the property. If the court finds that the defendant (or any combination of defendants) were the only persons with an interest in the property, then it would enter an order forfeiting the property in its entirety. Otherwise, the final order may forfeit only the defendant's interest in the property. This corresponds to the requirement under current law, at least as it is interpreted in some courts, in instances where Rule 31(e) applies.

The court may make the determination of the defendant's interest based on evidence in the record, or on additional evidence submitted by the government in support of the motion for the entry of a final judgment of forfeiture. The defendant would have no standing to object to the forfeiture on the ground that the property belonged to someone who could have filed a petition in the ancillary proceeding but failed to do so.

Subsection (b)(3) replaces Rule 32(d)(2) (effective December 1996). It provides that once the court enters a preliminary order of forfeiture directing the forfeiture of whatever interest each defendant may have in the forfeited property, the government may seize the property and commence an ancillary proceeding to determine the interests of any third party. Again, if no third party files a claim, the court, at the time of sentencing, will enter a final order forfeiting the property to the extent of the defendant's interest. If a third party files a claim, the order of forfeiture will become final as to the defendant at the time of sentencing but will be subject to amendment in favor of a third party pending the conclusion of the ancillary proceeding.

Because it is not uncommon for sentencing to be postponed for an extended period to allow a defendant to cooperate with the government in an ongoing investigation, the Rule would allow the order of forfeiture to become final as to the defendant before sentencing, if the defendant agrees to that procedure. Otherwise, the government would be unable to dispose of the property until the sentencing took place.

Subsection (c). Subsection (c) sets forth a set of rules governing the conduct of the ancillary proceeding. When the ancillary hearing provisions were added to 18 U.S.C. § 1963 and 21 U.S.C. § 853 in 1984, Congress apparently assumed that the proceedings under the new provisions would involve simple questions of ownership that could, in the ordinary case, be resolved in 30 days. *See* 18 U.S.C. § 1963(l)(4). Presumably for that reason, the statute contains no procedures governing motions practice or discovery such as would be available in an ordinary civil case.

Experience has shown, however, that ancillary hearings can involve

issues of enormous complexity that require years to resolve. *See United States v. BCCI Holdings (Luxembourg) S.A.*, 833 F. Supp. 9 (D.D.C. 1993) (ancillary proceeding involving over 100 claimants and $451 million); *United States v. Porcelli*, CR85-00756 (CPS), 1992 U.S. Dist. LEXIS 17928 (E.D.N.Y Nov. 5, 1992) (litigation over third party claim continuing 6 years after RICO conviction). In such cases, procedures akin to those available under the Federal Rules of Civil Procedure should be available to the court and the parties to aid in the efficient resolution of the claims.

Because an ancillary hearing is part of a criminal case, it would not be appropriate to make the Civil Rules applicable in all respects. The amendment, however, describes several fundamental areas in which procedures analogous to those in the Civil Rules may be followed. These include the filing of a motion to dismiss a claim, conducting discovery, disposing of a claim on a motion for summary judgment, and appealing a final disposition of a claim. Where applicable, the amendment follows the prevailing case law on the issue. *See, e.g., United States v. Lavin*, 942 F.2d 177 (3rd Cir. 1991) (ancillary proceeding treated as civil case for purposes of applying Rules of Appellate Procedure); *United States v. BCCI Holdings (Luxembourg) S.A. (In re Petitions of General Creditors)*, 919 F. Supp. 31 (D.D.C. 1996) ("If a third party fails to allege in its petition all elements necessary for recovery, including those relating to standing, the court may dismiss the petition without providing a hearing"); *United States v. BCCI (Holdings) Luxembourg S.A. (In re Petition of Department of Private Affairs)*, 1993 WL 760232 (D.D.C. 1993) (applying court's inherent powers to permit third party to obtain discovery from defendant in accordance with civil rules). The provision governing appeals in cases where there are multiple claims is derived from Fed. R. Civ. P. 54(b).

As noted in (c)(5), the ancillary proceeding is not considered a part of sentencing. Thus, the Federal Rules of Evidence would apply to the ancillary proceeding, as is the case currently.

Subsection (d). Subsection (d) replaces the forfeiture provisions of Rule 38(e) which provide that the court may stay an order of forfeiture pending appeal. The purpose of the provision is to ensure that the property remains intact and unencumbered so that it may be returned to the defendant in the event the appeal is successful. Subsection (d) makes clear, however, that a district court is not divested of jurisdiction over an ancillary proceeding even if the defendant appeals his or her conviction. This allows the court to proceed with the resolution of third party claims even as the appeal is considered by the appellate court. Otherwise, third parties would have to await the conclusion of the appellate process even to *begin* to have their claims heard. *See United States v. Messino*, 907 F. Supp. 1231 (N.D. Ill. 1995) (the district court retains jurisdiction over forfeiture matters while an appeal is pending).

Finally, subsection (d) provides a rule to govern what happens if the court determines that a third-party claim should be granted but the

defendant's appeal is still pending. The defendant, of course, is barred from filing a claim in the ancillary proceeding. *See* 18 U.S.C. § 1963(l)(2); 21 U.S.C. § 853(n)(2). Thus, the court's determination, in the ancillary proceeding, that a third party has an interest in the property superior to that of the defendant cannot be binding on the defendant. So, in the event that the court finds in favor of the third party, that determination is final only with respect to the government's alleged interest. If the defendant prevails on appeal, he or she recovers the property as if no conviction or forfeiture ever took place. But if the order of forfeiture is affirmed, the amendment to the order of forfeiture in favor of the third party becomes effective.

Subsection (e). Subsection (e) makes clear, as courts have found, that the court retains jurisdiction to amend the order of forfeiture at any time to include subsequently located property which was originally included in the forfeiture order and any substitute property. *See United States v. Hurley*, 63 F.3d 1 (lst Cir. 1995) (court retains authority to order forfeiture of substitute assets after appeal is filed); *United States v. Voight*, 89 F.3d 1050 (3rd Cir. 1996) (following *Hurley*). Third parties, of course, may contest the forfeiture of substitute assets in the ancillary proceeding. *See United States v.Lester*, 85 F.3d 1409 (9th Cir. 1996).

Summary of Comments to Rule 32.2

Jack E. Horsley, Esq. (CR-003)
Craig & Craig
Matoon, Illinois
September 23, 1997

Mr. Horsley favors all of the proposed changes.

James W. Evans (CR-005)
Harrisburg, Pennsylvania
September 25, 1997

Mr. Evans supports the proposed amendment.

Ms. Leslie Hagin (CR-013)
National Association of Criminal Defense Lawyers
Legislative Director and Counsel
December 12, 1997

Ms. Hagin states that his organization is submitting several significant proposed rule changes being considered by the committee. She requests permission to testify about the proposed changes to Rule 32.2.

Mr. Ronald F. Waterman (CR-014)
Gough, Shanahan, Johnons, & Waterman

Helena, Montana
December 16, 1997

Mr. Waterman writes that lenders and third parties have concerns about the procedures followed in forfeiture of a criminal defendant's interest in property, whether justified or not. He says that there exists a concern that a third party can lose legal interest in property without a meaningful opportunity to appear and defend title to the property. He adds that the adoption on Rule 32.2 is good because it resolves concerns raided by lenders and others immersing people in ancillary proceedings unless there is a finding that a criminal defendant has an interest in the property.

Peter Goldberger (CR-021b)
Ardmore, Pennsylvania
Co-Chair, National Association of Criminal Defense Lawyers
Committee on Rules of Procedure
February 15, 1998

The NACDL is adamantly opposed to the continuing efforts to abolish the right to jury trial on government claims for criminal forfeiture, and to undermine procedural rights associated with such claims. The NACDL states that the proposed amendment is "undemocratic, disrespectful of our legal culture and history, and flawed in numerous particulars." The NACDL contends that the proposal appears to breach the Rules Enabling Act wall between procedural reform and substantive rights. It recommends that the Advisory Committee reject the proposed rule changes almost completely. The NACDL states that there is no good reason to abolish the historically-grounded right to a jury trial in criminal forfeiture allegations and that such practice is unconstitutional, despite the Supreme Court's decision in *Libretti v. United States*, 516 U.S. 29 (1995). The NACDL notes that the right to jury trial in criminal forfeiture cases was not the formal question presented to the court in that case and it maintains that eliminating juries will not streamline the process. It also suggests that juries will not be confused by varying standards of proof if the standard "beyond a reasonable doubt" is carried over into forfeiture proceedings. The organization contends that the jury's collective conscience should be preserved, allowing it to protect the citizens from overreaching prosecutors. It states that it believes the proposed reform has nothing to do with procedural reform, but everything to do with the desire to punish and the desire to win.

The NACDL also maintains that the proposed amendment to Rule 32.2(b) would eliminate the requirement of 31(e) requiring a fact-finder to determine the extent of the interest or property subject to forfeiture. The

NACDL states that the proposed changes to 32.2(a) would "further devastate the fairness of the criminal forfeiture process by destroying" the grand jury's and trial jury's respective functions. The NACDL urges the Committee to clarify, despite contrary judicial decisions, that "only property or interests in property specifically named in the indictment may be forfeited criminally." The NACDL writes that Proposed Rule 32.2(f) should safeguard the defendant's and interested third parties' rights to be heard on the issue.

The NACDL states that the creation of rules to ensure fairness in ancillary forfeiture proceedings is an excellent idea. It notes that the rights of "third parties" should not be less than the rights of anyone making a claim in a civil forfeiture proceeding. The NACDL attached a copy of Petitioner's Brief in *Libretti v. United States*.

Federal Magistrate Judges Association (CR-024)
Hon. Tommy Miller, President
United States Magistrate Judge
February 2, 1998

The Association supports the adoption of new Rule 32.2. It notes that adoption of Rule 32.2 would effectively repeal the "statutory" right in Rule 31(e) to a jury trial for forfeitures but that the rule is a sensible and cost-effective procedure to resolve criminal forfeiture procedures.

Summary of Testimony--Rule 32.2

Mr. Bo Edwards
Mr. David Smith
National Association of Criminal Defense Lawyers

The witnesses expressed strong opposition to the proposed new Rule. Their chief objection centered on the fact that the new rule removes the right of jury to decide whether the defendant should forfeit any property. That right, they said, was not abrogated by the Supreme Court's decision in *Libretti*; the issue of whether a jury trial was not available in a forfeiture proceeding was not even briefed by the parties in that case. Even assuming that the right to jury is not constitutionally required, they urged the Committee to nonetheless retain that right under the Rules of Procedure. Doing so, they argued, would recognize the value that Americans place on property rights. They also objected to the summary procedures for making forfeiture proceedings and the possibility that the

property rights of innocent third parties would not be adequately protected.

Mr. Steff Casella
Department of Justice

Mr. Casella responded to the testimony of the witnesses representing the NADCL and pointed out that the Supreme Court in Libretti did clearly say that forfeiture proceedings are a part of sentencing. Based upon that view, the Department of Justice believed that the rule was consistent with existing practice and the constitution. He noted that the rights of third parties would be as protected as they currently are under statutory schemes for determining their interests in "ancillary proceedings."

GAP Report--Rule 32.2

The Committee amended the rule to clarify several key points. First, subdivision (b) was redrafted to make it clear that if no third party files a petition to assert property rights, the trial court must determine whether the defendant has an interest in the property to be forfeited and the extent of that interest. As published, the rule would have permitted the trial judge to order the defendant to forfeit the property in its entirety if no third party filed a claim.

Second, Rule 32.2(c)(4) was added to make it clear that the ancilllary proceeding is not a part of sentencing.

Third, the Committee clarified the procedures to be used if the government (1) discovers property subject to forfeiture after the court has entered an order of forfeiture and (2) seeks the forfeiture of "substitute" property under a statute authorizing such substitution.

Rule 38. Stay of Execution

* * * * *

(e) ~~CRIMINAL FORFEITURE,~~ NOTICE TO VICTIMS, AND RESTITUTION. A sanction imposed as part of the sentence pursuant to 18 U.S.C. ~~3554,~~ 3555, or 3556 may, if an appeal of the conviction or sentence is taken, be stayed by the district court or by the court of appeals upon such terms as the court finds appropriate. The court may issue such orders as may be reasonably necessary to ensure compliance with the sanction upon disposition of the appeal, including the entering of a restraining order or an injunction or requiring a deposit in whole or in part of the monetary amount involved into the registry of the district court or execution of a performance bond.

COMMITTEE NOTE

The rule is amended to reflect the creation of new rule 32.2 which now governs criminal forfeiture procedures.

Summary of Comments on Rule 38.

The Committee received no comments on the proposed change to Rule 38.

GAP Report--Rule 38

The Committee made no changes to the published draft.

Rule 54. Application and Exception

(a) COURTS. These rules apply to all criminal proceedings in the United States District Courts; in the District Court 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); and 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.

COMMITTEE NOTE

The amendment to Rule 54(a) is a technical amendment removing the reference to the court in the Canal Zone, which no longer exists.

Summary of Comments on Rule 54

David Long, Dir. of Research (CR-023)
Criminal Law Section, State Bar of California
San Francisco, CA
March 18, 1998

The Criminal Law Executive Committee of the California State Bar supports the proposed amendments to Rule 54.

Federal Magistrate Judges Association (CR-024)
Hon. Tommy Miller, President
United States Magistrate Judge
February 2, 1998

The Federal Magistrate Judges supports the technical changes to the amendment to Rule 54.

GAP Report--Rule 54.

The Committee made no changes to the published draft.

III. Information Items--Rules Pending Further Discussion and Publication

At its April 1998 meeting the Committee discussed a number of proposed amendments to other Rules of Criminal Procedure. Although several of them are ready for publication and comment, the Committee has decided to defer any further action on those rules. None of the proposed amendments are critical at this point, and as noted, *infra*, the Committee will shortly embark on a restyling project of all of the rules. The Committee believed that the amendments should thus be deferred until the restyled rules are published.

A. Rule 5. Initial Appearance Before the Magistrate Judge. (Authority of Magistrate Judge to Grant Continuance Over Defendant's Objection)

At its April 1997 meeting, the Committee considered a proposed amendment to Rule 5(c) which would permit magistrate judges to grant continuances where the defendant objects. The original proposal originated in the Federal Magistrate Judges Association who pointed out that under the current version of Rule 5(c), during an initial appearance before a magistrate judge, that judge is not authorized to grant a continuance over an objection by the defendant; that authority rests only in a federal district judge. The rule mirrors 18 U.S.C. § 3060(c). The Committee decided to recommend to the Standing Committee that it first propose legislative changes to § 3060(c). The Committee, however, believed it more appropriate to for the Advisory Committee to propose a change to Rule 5(c) through the Rules Enabling Act and remanded the issue to the Advisory Committee. At its October 1997 meeting, the Committee considered the issue and decided not to pursue the issue any further, and reported that position to the Standing Committee at its January 1998 meeting.

The matter was presented to the Judicial Conference during its Spring 1998 meeting. In its summary of actions, the Conference remanded the issue to the Advisory Committee with:

> "instructions to the Rules Committee to propose an amendment to Criminal Rule 5(c) consistent with the amendment 18 U.S.C. § 3060 which has been proposed by the Magistrate Judges Committee."

At its April 1998 meeting the Advisory Committee did reconsider the proposed amendment and voted unanimously to approve the amendment but not to seek publication of the amendment at this time. The Committee is schedule to begin a restyling of the rules later this year and believes that rather than piecemeal amendments at this point, it would be better to defer any publication. A copy of the proposed amendment and Committee

Note are attached at Exhibit B.

B. Rules 10 (Arraignment) and 43 (Presence of Defendant) (Ability of Defendant to Waive Appearance at Arraignment).

The Committee is actively considering amendments to Rules 10 and 43 which would permit a defendant to waive an appearance at his or her arraignment. The rule would require that the waiver be in writing and with the consent of the court. In conjunction with those amendments, the Committee will also consider the possibility of amending Rules 10 and 43 to permit a defendant to waive an appearance for entering a plea on superseding indictment.

C. Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition. (Court-Ordered Examination)

At its October 1998 meeting, the Committee will continue it consideration of amendments to Rule 12.2 which would accomplish two results. First, a defendant who intends to introduce expert testimony on the issue of mental condition at a capital sentencing proceeding would be required to give notice of an intent to do so. And second, the rule would make it clear that the trial court would have the authority to order a mental examination of a defendant who had given such notice. The Committee is considering what provision should be made for releasing the results of that examination to the parties and the possible implications on the defendant's right against self-incrimination.

D. Rule 24(b). Peremptory Challenges. (Equalizing Number of Challenges for Defense and Prosecution)

The Committee has approved, by a vote of 6 to 5) an amendment to Rule 24(b) which equalizes the number of peremptory challenges in a non-capital felony case at 10 per side. The language would track the most recent legislative proposal in § 501, Senate Bill 3 (*Omnibus Crime Control Act of 1997*). The momentum for the amendment was generated in part by the fact that some members of Congress continue to show an interest in amending Rule 24(b).

In 1990, the Advisory Committee proposed an amendment to Rule 24(b) which would have equalized the number of peremptory challenges—six apiece—for the prosecution and the defense by reducing the number of challenges available to the defense by four. The proposed amendment was approved by the Standing Committee for public comment but when it reviewed the proposal again in February 1991 following that

comment period, it rejected the amendment. Since then, there has been no attempt to revisit the issue by either the Advisory Committee or Standing Committee. The Standing Committee's rejection of the proposal in 1991 has generally been used by the Administrate Office and Judicial Conference to convince Congress not to amend Rule 24(b).

Nonetheless, the Committee believed that it light of persistent proposals to legislatively amend Rule 24(b) it would be appropriate to revisit the issue and be prepared, if necessary, to seek public comment on the proposed equalization.

The amendment is not considered essential and could wait for publication of the restyled Rules of Criminal Procedure.

E. Rule 26. Taking of Testimony (Electronic Transmission)

The Committee has considered an amendment to Rule 26 which would conform that rule to Civil Rule 43 regarding the taking of testimony in court through means other than oral testimony. After discussing the rule, however, the Committee decided to defer further consideration of that amendment until it has had an opportunity to discuss further possible Confrontation Clause concerns and whether such testimony should be preferred over deposition testimony.

F. Rule 30. Submission of Requests for Instructions.

An amendment to Rule 30, which would permit the court to require the parties to submit pretrial requests for instructions was published for public comment last fall. At its April 1998 meeting, the Committee discussed the comments received and decided to defer any further consideration of amendments to the Rule. The Civil Rules Committee is considering similar amendments to Rule 51 and is also considering possible amendments which would clarify issues of preservation of error re instructions errors. The Committee will continue discussions of this item.

G. Rule 32. Sentence and Judgment (Release of Presentence Reports).

The Committee on Criminal Law is currently considering several options for dealing with disclosure of presentence reports to someone other than the parties. One of the options under consideration by that Committee is the adoption of a model local rule on the topic. The issue apparently arose from a question posed to the General Counsel's office. At its April 1998 meeting, the Advisory Committee discussed this issue and recommended that the Chair appoint a subcommittee to consider any proposed amendments at its next meeting. The Chair also indicated that he would contact the Chair

of the Criminal Law Committee to coordinate any proposed amendments.

H. Rule 49. Service and Filing of Papers.

The Committee has briefly discussed a proposal to amend Rule 49 to permit the clerk of the court to forward notices by fax or other electronic means. Similar amendments are proposed for Appellate Rule 3(d) and Civil Rule 77(d). Although the Committee has proposed no specific language and has taken no position on the proposal, the Chair will continue to coordinate the proposal with the Subcommittee on Technology.

I. Rules Governing § 2254 and § 2255 Rules (Habeas Corpus Proceedings)

A subcommittee of the Advisory Committee is actively considering a number of amendments to the rules governing habeas corpus proceedings which will make the two sets of rules consistent with each other and make any other conforming amendments resulting from the Antiterrorism and Effective Death Penalty Act of 1996.

IV. Information Items--Rules Possibly Affected by Legislative Proposals.

A. Rule 46. Release From Custody (Authority to Revoke Bond for Reasons Other than Nonappearance).

Last summer, Representative Bill McCullum (Fla.) introduced H.R. 2134, "Bail Bond Fairness Act," which would amend Rule 46(e) to limit the authority to revoke bonds to those situations where a defendant has failed to appear. Under current practice a magistrate or judge may impose conditions which are not limited to failures to appear, e.g., to remain in particular location or to refrain from violating the law, etc. Representative McCullum agreed to delay any further action on his proposal until the Advisory Committee had an opportunity to review the matter under the Rules Enabling Act and decide whether to propose and forward to the Standing Committee an amendment of its own.

At the April 1998 meeting the Committee fully discussed the issue and determined that no amendment should be recommended to the Rule. A poll of magistrate judges indicated that many do not use corporate sureties but instead release a defendant on personal recognizance or when a friend or family member posts personal property or signs an unsecured bond. Some do revoke bond for reasons other than nonappearance. The Committee learned that in those districts the magistrates believe strongly that holding a relative's or friend's assets insure compliance with release conditions. The Committee

ultimately voted by a narrow margin to reject any proposed amendments which would limit the current practice. A letter explaining the Committee's action has been sent to Representative McCullom.

B. Rules Governing Attorney Conduct.

Following a presentation by Professor Coquillette on proposed rules governing attorney conduct in federal courts and the options available for addressing that issue, the Committee voted unanimously to authorize the Chair to appoint two members to serve on a coordinating committee to address the issue and make recommendations. The Committee took no position on whether to adopt a "dynamic conformity rule," a core set of rules, or a complete set of rules governing attorney conduct.

C. Status Report on Proposed Restyling of Criminal Rules.

Judge Parker, Chair of the Style Subcommittee, has informed the Criminal Rules Committee that the subcommittee is in the process of preparing proposed restyling changes to the Rules of Criminal Procedure and that he expect to submit a completed draft to the Committee by December 1, 1998.

Attachments:

A. Proposed Amendment to Rule 5(c).
B. Draft Minutes of April 1998 Meeting

Report to Standing Committee
Criminal Rules Committee
May 1998

EXHIBIT A

Rule 5. Initial Appearance Before the Magistrate Judge

* * * * *

(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.

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. 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, a federal magistrate judge may extend the 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~~ a federal magistrate judge or ~~by~~ a judge of the United States may extend the time limits only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.

ADVISORY COMMITTEE NOTE

The amendment 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. That procedure can lead to needless consumption of judicial resources and the consumption of time by counsel, staff personnel, marshals, and other personnel.

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. But the current distinction between continuances granted with or without the consent is an anomaly. While the magistrate judge is charged with making probable cause determination and other decisions regarding the defendant's liberty interests, the current rule prohibits the magistrate judge from making a decision regarding a continuance unless the defendant consents. On the other hand, it seems clear that the role of the magistrate judge has developed toward a higher level of responsibility for pre-indictment matters. Furthermore, the Committee believes that the change in the rule will provide greater judicial economy.