Agenda E-21 (Summary)
Rules
March 1991

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE COMMITTEE

ON THE RULES OF PRACTICE AND PROCEDURE

The Committee on the Rules of Practice and Procedure recommends that the Conference:

Agenda E-21
Rules
March 1991

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON THE RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITES STATES:

Your Committee on the Rules of Practice and Procedure met in Washington, D. C., on February 4, 1991. All members of the Committee attended the meeting except Judge Charles E. Wiggins, Charles Alan Wright, and Gael Mahony who were unavoidably absent. Also present were Judge Kenneth F. Ripple, Chairman, and Assistant Dean Carol Ann Mooney, Reporter, of the Appellate Rules Advisory Committee; Judge Sam C. Pointer, Chairman, and Professor Paul D. Carrington, Reporter, of the Civil Rules Advisory Committee; Judge William Terrell Hodges, Chairman, and Professor David A. Schluetter, Reporter, of the Criminal Rules Advisory Committee; and Judge Edward Leavy, Chairman, and Professor Alan N. Resnick, Reporter, of the Bankruptcy Rules Advisory Committee. Judge Edward R. Becker attended as the liaison member of the Long-range Planning Committee. The Reporter to your Committee, Dean Daniel R. Coquillette, attended the meeting, along with Mary P. Squiers, Esq., Project Director of the Local Rules Project. Scott Schell, who is on the staff of the Senate Judiciary Committee, attended as did two representatives of the defense bar, Benson Weintraub, Esq. of Miami, Florida and Alan Chaset, Esq., of Alexandria, Virginia. Also present were James E. Macklin, Jr., Secretary to your Committee and Deputy Director of the Administrative Office; Peter G. McCabe,

Assistant Director for Program Management of the Administrative Office; William B. Eldridge, Director, and John E. Shapard, Research Division, Federal Judicial Center; Patricia S. Channon of the Bankruptcy Division of the Administrative Office; and David N. Adair, Jr., Assistant General Counsel of the Administrative Office.

I. Amendments to the Rules of Practice and Procedure

A. Federal Rules of Criminal Procedure

The Advisory Committee on the Federal Rules of Criminal Procedure has submitted to your Committee amendments to Criminal Rules 16(a)(1)(A), 35(b), and 35(c), as well as technical amendments to Criminal Rules 32, 32.1, 46, 54(a), and 58. The proposed amendment to Rule 16(a)(1)(A) would slightly expand the duty of the Government to disclose a defendant's oral statements.

The proposed amendment to Rule 35(b) would permit the government to move the sentencing court to reduce the defendant's sentence for substantial assistance more than one year after the imposition of sentence under certain circumstances. The proposed amendment to Rule 35(c) is based upon, but differs from, a recommendation of the Federal Courts Study Committee. It would permit the court to correct a technical error in a sentence within seven days of its imposition. If the Conference approves the proposed amendment to Rule 35(c), your Committee, at the request of the Advisory Committee, will refer to the Appellate Rules Advisory Committee a suggestion to consider an amendment to Appellate Rule 4, which would stipulate that the filing of a notice of appeal would not divest the district court of jurisdiction to act within the seven-day period provided in amended Rule 35(c).

The above-referenced amendments to the Federal Rules of Criminal Procedure have been circulated for public comment and minor changes made in the Advisory Committee Notes in response thereto.

The Advisory Committee had also submitted to your Committee, on a closely divided vote, a proposed amendment to Rule 24(b) that would equalize the number of peremptory challenges in a criminal trial: 20 for each side in a capital case, six for each side in a felony case, and 3 for each side in a misdemeanor case. A similar amendment, which had provided for eight challenges in a felony case, had been proposed in Congress in the last session, but was not passed. Your Committee, after discussion, voted unanimously against recommending the amendment to the Judicial Conference.

The proposed amendments to Rules 32(c)(2)(A), 32(c)(3)(A), 32.1(a)(1), 46(h), 54(a), 58(b)(2)(A) and 58(d)(3) would correct technical errors. Because these proposed amendments are purely technical, your Committee recommends their approval without public comment.

These proposed amendments are set out in Appendix A, and are accompanied by Advisory Committee Notes and a report explaining their purpose and intent.

> **Recommendation 1:** That the Judicial Conference approve amendments to Rules 16(a), 32(c), 32.1(a), 35(b), 35(c), 46(h), 54(a), 58(b) and 58(d) of the Federal Rules of Criminal Procedure and transmit them to the Supreme Court for its consideration with the recommendation that they be approved and transmitted to Congress pursuant to law.

B. Federal Rules of Evidence

The Advisory Committee on the Federal Rules of Criminal Procedure has submitted to your Committee proposed amendments to Evidence Rule 404(b) as well

as a technical amendment to Evidence Rule 1102. The proposed amendment to Rule 404(b) would add a pretrial notice requirement for the use of certain character evidence in criminal cases. The proposed amendment to Rule 1102 would change an incorrect reference in the rule. The amendment to Rule 404(b) of the Federal Rules of Evidence was circulated for public comment and minor changes made to the Advisory Committee Notes in response thereto. Because the proposed amendment to Rule 1102 is purely technical, your Committee recommends its adoption without public comment.

These proposed amendments are set out in Appendix B, and are accompanied by Advisory Committee Notes and a report explaining their purpose and intent.

> **Recommendation 2:** That the Judicial Conference approve amendments to Rules 404(b) and 1102 of the Federal Rules of Evidence and transmit them to the Supreme Court for its consideration with the recommendation that they be approved and transmitted to Congress pursuant to law.

C. Federal Rules of Bankruptcy Procedure

The Advisory Committee on the Federal Rules of Bankruptcy Procedure has submitted to your Committee proposed technical amendments to Bankruptcy Rules 5011(b) and 9027(e). The proposed amendments would conform those rules to changes to 28 U.S.C. §§ 1334 and 1452(d) effected by section 309 of the Judicial Improvements Act of 1990. These statutory changes remove the prohibition of an appeal to the district court of an order by a bankruptcy judge to abstain from hearing a bankruptcy case under 28 U.S.C. § 1334(c)(2) or an order to remand a removed proceeding relating to a bankruptcy case under 28 U.S.C. § 1452(b). The current provisions of Rules 5011(b) and 9027(e) are in conflict with the amended sections in that they prohibit the bankruptcy judge from entering such orders. Because the current

provisions would frustrate the purpose of the statutory changes and because the amendment of those provisions simply conforms them to the new statutory scheme, the Advisory Committee has requested that these proposed amendments be approved without public comment. Your Committee agrees and notes that the approval of these amendments at this meeting would allow them to be transmitted to the Supreme Court in time for them to be considered with the amendments to the Bankruptcy Rules currently under consideration by the Court. If transmitted to Congress by May 1, 1991, these amendments would all then be effective August 1, 1991, under the provisions of 28 U.S.C. § 2075.

These proposed amendments are set out in Appendix C, and accompanied by Advisory Committee Notes and a report explaining their purpose and intent.

> **Recommendation 3:** That the Judicial Conference approve amendments to Rules 5011(b) and 9027(e) of the Federal Rules of Bankruptcy Procedure and transmit them to the Supreme Court for its consideration with the recommendation that they be approved and transmitted to Congress pursuant to law.II.

II. Amendment of the Procedures of the Committees on Rules of Practice and Procedure

The Secretary of your Committee has requested that the Procedures for the Conduct of Business of the Committees on Rules of Practice and Procedure be amended at paragraph 4(d) to permit the Committees to recommend the approval without public notice and comment of amendments to the Rules of Practice and Procedure that are purely technical or conforming. This report contains several examples of the types of amendments, the consideration of which would not benefit from public comment. Four of the proposed amendments to the Criminal Rules and one of the Evidence Rules are simply to correct technical errors. The amendments to

the Bankruptcy Rules would simply conform those rules to statutory changes. They are designed to remove an identical restriction on the authority of bankruptcy judges that was removed by statutory amendment. Because the proposed amendment would merely effectuate a statutory change, public comment would not appear appropriate or necessary.

Although technical and conforming amendments have in the past been adopted without public notice and comment, the current Procedures could be read to prohibit the practice. Accordingly, your Committee recommends that the following sentence be added to the end of paragraph 4(d) of the Procedures:

> "The Standing Committee may eliminate the public notice and comment requirements if, in the case of a technical or conforming amendment, it determines that notice and comment are not appropriate or necessary. Whenever such an exception is made, the Standing Committee shall advise the Judicial Conference of the exception and the reasons for the exception."

Your Committee does not intend that the elimination of public notice and comment should be approved unless there is substantial reason why the amendment would not benefit from such notice and comment. Accordingly, the proposed amendment requires an explanation of the elimination of public notice and comment so that the Judicial Conference, the Supreme Court and, ultimately, Congress may review the appropriateness of the action of the Standing Committee.

> **Recommendation 4:** That the Judicial Conference approve an amendment to paragraph 4(d) of the Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure to permit the Committees to recommend approval of technical or conforming amendments to the Rules without public notice and comment.

III. Local Rules Project - Report on the Local Rules of Appellate Procedure

The reporter to your Committee, Dean Daniel R. Coquillette, has submitted to your Committee a draft report on local appellate rules, which constitutes the final phase of the Local Rules Project. The Conference authorized the project in September 1984, and it began operation after the approval of its plan and budget in 1986. In 1988 your Committee approved the project's report on local district court rules. That report included a Uniform Numbering System for local district rules, which was approved by the Judicial Conference at its September 1988 meeting. The Conference further urged that the system be adopted by the various United States district courts.

As with the report on the local district rules, the report on appellate rules discusses and analyzes existing local rules of appellate practice, identifies local rules that may be in conflict with, or may simply repeat the Federal Rules, identifies subjects of local rulemaking that should be considered by the Advisory Committee on Appellate Rules, identifies subjects that should remain subject to local variation and proposes a Uniform Numbering System for local appellate rules that corresponds with the Federal Rules of Appellate Procedure. Your Committee agreed that the draft report should be distributed to the United States Courts of Appeals for comment prior to its final approval.

IV. Consideration of Reexamination of the Rules of Practice and Procedure

Your Committee, after extensive discussion about a general reexamination of the Rules of Practice and Procedure, referred a number of specific proposals dealing with expedited trial procedures to the Advisory Committees on Civil, Criminal and Bankruptcy Procedure, respectively. The advisory committees were requested to

examine the proposals and in due course, report the results of that examination to the Standing Committee.

Your Committee also directed the Reporter, in consultation with representatives of the Federal Judicial Center, to prepare a report on published studies and other materials concerning potentially basic improvements of trial procedures (as distinguished from pretrial procedures). The report will be aimed at evaluating the extent of problems of cost and delay and identifying proposals for solutions that might in the future be placed on the agenda of the Standing Committee or the appropriate advisory committee. The report will be presented to your Committee at its July 1991 meeting.

Respectfully submitted,

Robert E. Keeton, Chairman
George C. Pratt
Dolores K. Sloviter
Charles E. Wiggins
Sarah Evans Barker
William O. Bertelsman
Thomas S. Ellis III
Edwin J. Peterson
Charles Alan Wright
Thomas E. Baker
Gael Mahony
William R. Wilson

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

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CRIMINAL RULES
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BANKRUPTCY RULES

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

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

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

DATE: December 18, 1990

I. INTRODUCTION

At its November 1990 meeting the Advisory Committee on the Rules of Criminal Procedure acted upon proposed or pending amendments to a number of Rules of Criminal procedure and one Rule of Evidence. This report addresses those proposals and the recommendations to the Standing Committee. The minutes of that meeting, *** and copies of the rules and the accompanying Committee Notes are attached. In summary, the rules and the recommended actions are as follows:

A. Rules of Criminal Procedure Circulated for Public Comment.

Four rules previously considered and approved by the Standing Committee for circulation to the bench and the bar have been reviewed by the Advisory Committee. The Committee recommends that the Rules be approved by the Standing Committee and forwarded to the Judicial Conference.

1. Rule 16(a)(1)(A). Statement of Defendant.

* * * * *

2. Rule 35(b). Reduction of Sentence.

3. Rule 35(c). Correction of Sentence.

B. Rules of Evidence Circulated for Public Comment.

One Rule of Evidence has been circulated to the bench and the bar for comment. After considering the public comments, the Committee recommends that it be approved by the Standing Committee and forwarded to the Judicial Conference.

1. Fed. R. Evid. 404(b). Notice Provision.

C. Proposed Technical Amendments to Rules of Criminal Procedure and Rules of Evidence.

The Advisory Committee recommends that technical amendments be made in the following Rules, as discussed infra,

1. Rule 32. Technical Amendments.

2. Rule 32.1. Technical Amendment.

3. Rule 46. Technical Amendment.

4. Rule 54(a). Technical Amendment.

5. Rule 58. Technical Amendment.

* * * * *

6. Fed. R. Evid. 1102. Technical Amendment.

II. RULES OF CRIMINAL PROCEDURE CIRCULATED FOR PUBLIC COMMENT.

In January 1990, the Standing Committee approved amendments in Rule 16(a)(1)(A), Rule 24(b), and Rule 35(a) for circulation to the public. In July 1990, the Standing Committee approved the circulation of a new provision, Rule 35(c), on an expedited basis. Comments were received on all of these rules and considered by the Advisory Committee at its November 1990 meeting.***

The Advisory Committee recommends that the Standing Committee approve these three amendments and forward them to the Judicial Conference.

III. RULE OF EVIDENCE CIRCULATED FOR PUBLIC COMMENT.

In January 1990, the Standing Committee approved the publication of a proposed amendment to Federal Rule of Evidence 404(b) which would add a notice provision in criminal cases. At its November 1990 meeting, the Advisory Committee considered the written comments it had received.

The Advisory Committee recommends that the Standing Committee approve the amendment to Rule 404(b) and forward it to the Judicial Conference.

IV. PROPOSED TECHNICAL AMENDMENTS TO RULES OF CRIMINAL PROCEDURE AND RULES OF EVIDENCE.

Although the Advisory Committee has no proposed amendments to be published for circulation to the bench and the bar at this time, a number of technical amendments are in order. The Advisory Committee therefore recommends that the Standing Committee approve the following technical amendments to the Rules of Criminal Procedure and Rules of Evidence.

A. Rule 32(c)(2)(A). Mr. Edward F. Willett, Law Revision Counsel, U.S. House of Representatives, has suggested several technical changes to Rule 32(c)(2)(A). The Advisory Committee recommends that the Standing Committee approve the following technical changes in that Rule and present them to the Judicial Conference. The page and footnote references are in the December 1, 1990 copy of the Federal Rules of Criminal Procedure published by the United States Printing Office, for the House Committee on the Judiciary.

1. Page 32: A semicolon should be added after "defendant" -- the last word in the sentence under (A). See Footnote.

2. Page 33: Strike comma after "opinions" -- eighth line, comma should follow the word "which", ninth line. See Footnote.

B. Rule 32.1. Mr. Willett, supra, suggests that a technical change be made in subdivision Rule 32.1(a)(1), on page 34 by deleting the "s" from "grounds" in the third line. See Footnote.

C. Rule 46(h). The reference in Rule 46(h), on page 45, to 18 U.S.C. 3142(c)(2)(K) is incorrect. Public Law 99-646 changed the references in 3142(c); the new provision is 18 U.S.C. 3142(c)(1)(B)(xi).

D. Rule 54(a). Because of changes in legislation, the Advisory Committee recommends that appropriate technical changes be made in Rule 54(a). That rule addresses the applicability of the Rules of Criminal Procedure. As noted in the Advisory Committee Note accompanying the amendment, changes proposed by the Committee would clarify the ability of the District Courts in the Virgin Islands to begin criminal prosecutions through the indictment process. The Advisory Committee recommends that the Standing Committee approve this

technical change. The Rule and accompanying Note are attached to this Report.

E. Rule 58. Mr. Willett, supra, also suggests that two minor changes should be made to Rule 58. The page and Footnote references are, as above, to the version of the Rules published for use by the Committee on the Judiciary, House of Representatives:

1. Page 50: The first word in subsection 58(b)(2)(A), "The," should not be capitalized. See Footnote.

2. Page 52: The word "subdivision" should be inserted before "(b)(1)" in the first sentence of Rule 58(d)(3). See Footnote.

F. Rule 58, et al, regarding term "Magistrate." The 1990 Crime Control Act changed the term "magistrate" to "magistrate judge". An attached letter from Magistrate Harvey Schlesinger, a member of the Advisory Committee explains the need for the technical change in terminology throughout all of the Rules of Criminal Procedure.

The Advisory Committee will consider appropriate conforming amendments to the Rules of Criminal Procedure.

G. Federal Rule of Evidence 1102. The language in Federal Rule of Evidence 1102, "in section 2076 of title 28 of the United States Code" should be changed to, "in section 2072 of title 28 of the United States Code." The change was effected by Title IV -- "Rules Enabling Act", Public Law 100-702, effective December 1, 1988.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 16. Discovery and Inspection

(a) DISCLOSURE OF EVIDENCE BY THE GOVERNMENT.

(1) Information Subject to Disclosure.

(A) STATEMENT OF DEFENDANT. Upon request of a defendant the government shall ~~permit the defendant to inspect and copy or photograph~~ disclose to the defendant and make available for inspection, copying or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; that portion of any written record containing the substance of any relevant oral statement ~~which the government intends to~~

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

~~offer in evidence at the trial~~ made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. The government shall also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial.

* * * * *

COMMITTEE NOTE

The amendment to Rule 16(a)(1)(A) expands slightly government disclosure to the defense of statements made by the defendant. The rule now requires the prosecution, upon request, to disclose any written record which contains reference to a relevant oral statement by the defendant which was in response to interrogation, without regard to whether the prosecution intends to use the statement at trial. The change recognizes that the defendant has some proprietary interest in statements made during interrogation regardless of the prosecution's intent to make any use of the statements.

The written record need not be a transcription or summary of the defendant's statement but must only be some written reference which would provide some means for the prosecution and defense to identify the statement. Otherwise, the prosecution would have the difficult task of locating and disclosing the myriad oral statements

made by a defendant, even if it had no intention of using the statements at trial. In a lengthy and complicated investigation with multiple interrogations by different government agents, that task could become unduly burdensome.

The existing requirement to disclose oral statements which the prosecution intends to introduce at trial has also been changed slightly. Under the amendment, the prosecution must also disclose any relevant oral statement which it intends to use at trial, without regard to whether it intends to introduce the statement. Thus, an oral statement by the defendant which would only be used for impeachment purposes would be covered by the rule.

The introductory language to the rule has been modified to clarify that without regard to whether the defendant's statement is oral or written, it must at a minimum be disclosed. Although the rule does not specify the means for disclosing the defendant's statements, if they are in written or recorded form, the defendant is entitled to inspect, copy, or photograph them.

Rule 32. Sentence and Judgment

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(c) PRESENTENCE INVESTIGATION.

(2) Report. The report of the presentence investigation shall contain--

(A) information about the history and characteristics of the defendant, including prior criminal record, if any, financial condition, and any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in the correctional treatment of the defendant;

* * * * *

(3) Disclosure.

(A) At least 10 days before imposing sentence, unless this minimum period is waived by the defendant, the court shall provide the defendant and the defendant's counsel with a copy of the report of the presentence investigation, including the information required by subdivision (c)(2) but not including any final recommendation as to sentence, and not to the extent that in the opinion of the court the report contains diagnostic opinions, which, if disclosed, might seriously disrupt a program of rehabilitation; or sources of information obtained upon a promise of confidentiality; or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. The court shall afford the defendant and the defendant's counsel an opportunity to comment on the report and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it.

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COMMITTEE NOTE

The amendments are technical. No substantive changes are intended.

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

(a) REVOCATION OF PROBATION OR SUPERVISED RELEASE.

(1) Preliminary Hearing. Whenever a person is held in custody on the grounds that the person has violated a condition of probation or supervised release, the person shall be afforded a prompt hearing before any judge, or a United States magistrate who has been given the authority pursuant to 28 U.S.C. § 636 to conduct such hearings, in order to determine whether there is probably cause to hold the person for a revocation hearing. The person shall be given

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COMMITTEE NOTE

The amendment is technical. No substantive change is intended.

Rule 35. Correction or Reduction of Sentence

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(b) ~~CORRECTION~~ REDUCTION OF SENTENCE FOR CHANGED CIRCUMSTANCES. -- The court, on motion of the Government~~,~~ made ~~may~~ within one year after the imposition of the sentence, may reduce ~~lower~~ a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code. The court may consider a government motion to reduce a sentence made one year or more after imposition of the sentence where the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after imposition of sentence. The court's authority to reduce ~~lower~~ a sentence under this subsection includes the authority to reduce ~~lower~~ such sentence to a level below that established by statute as a minimum sentence.

(c) Correction of Sentence By Sentencing Court. -- The Court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error.

COMMITTEE NOTE

Rule 35(b), as amended in 1987 as part of the Sentencing Reform Act of 1984, reflects a method by which the government may obtain valuable assistance from defendants in return for an agreement to file a motion to reduce the sentence, even if the reduction would reduce the sentence below the mandatory minimum sentence.

The title of subsection (b) has been amended to reflect that there is a difference between correcting an illegal or improper sentence, as in subsection (a), and reducing an otherwise legal sentence for special reasons under subsection (b).

Under the 1987 amendment, the trial court was required to rule on the government's motion to reduce a defendant's sentence within one year after imposition of the sentence. This caused problems, however, in situations where the defendant's assistance could not be fully assessed in time to make a timely motion which could be ruled upon before one year had elapsed. The amendment requires the government to make its motion to reduce the sentence before one year has elapsed but does not require the court to rule on the motion within the one year limit. This change should benefit both the government and the defendant and will permit completion of the defendant's anticipated cooperation with the government. Although no specific time limit is set on the court's ruling on the motion to reduce the sentence, the burden nonetheless rests on the government to request and justify a delay in the court's ruling.

The amendment also recognizes that there may be those cases where the defendant's assistance or cooperation may not occur until after one year has elapsed. For example,

the defendant may not have obtained information useful to the government until after the time limit had passed. In those instances the trial court in its discretion may consider what would otherwise be an untimely motion if the government establishes that the cooperation could not have been furnished within the one-year time limit. In deciding whether to consider an untimely motion, the court may, for example, consider whether the assistance was provided as early as possible.

Subdivision (c) is intended to adopt, in part, a suggestion from the Federal Courts Study Committee 1990 that Rule 35 be amended to recognize explicitly the ability of the sentencing court to correct a sentence imposed as a result of an obvious arithmetical, technical or other clear error, if the error is discovered shortly after the sentence is imposed. At least two courts of appeals have held that the trial court has the inherent authority, notwithstanding the repeal of former Rule 35(a) by the Sentencing Reform Act of 1984, to correct a sentence within the time allowed for sentence appeal by any party under 18 U.S.C. 3742. See United States v. Cook, 890 F.2d 672 (4th Cir. 1989) (error in applying sentencing guidelines); United States v. Rico, 902 F.2d 1065 (2nd Cir. 1990) (failure to impose prison sentence required by terms of plea agreement). The amendment in effect codifies the result in those two cases but provides a more stringent time requirement. The Committee believed that the time for correcting such errors should be narrowed within the time for appealing the sentence to reduce the likelihood of jurisdictional questions in the event of an appeal and to provide the parties with an opportunity to address the court's correction of the sentence, or lack thereof, in any appeal of the sentence. A shorter period of time would also reduce the likelihood of abuse of the rule by limiting its application to acknowledged and obvious errors in sentencing.

The authority to correct a sentence under this subdivision is intended to be very narrow and to extend only to those cases in which an obvious error or mistake has occurred in the sentence, that is, errors which would almost certainly result in a remand of the case to the trial court for further action under Rule 35(a). The subdivision is not intended to afford the court the opportunity to reconsider the application or interpretation of the sentencing guidelines or for the

court simply to change its mind about the appropriateness of the sentence. Nor should it be used to reopen issues previously resolved at the sentencing hearing through the exercise of the court's discretion with regard to the application of the sentencing guidelines. Furthermore, the Committee did not intend that the rule relax any requirement that the parties state all objections to a sentence at or before the sentencing hearing. See, e.g., United States v. Jones, 899 F.2d 1097 (11th Cir. 1990).

The subdivision does not provide for any formalized method of bringing the error to the attention of the court and recognizes that the court could sua sponte make the correction. Although the amendment does not expressly address the issue of advance notice to the parties or whether the defendant should be present in court for resentencing, the Committee contemplates that the court will act in accordance with Rules 32 and 43 with regard to any corrections in the sentence. Compare United States v. Cook, supra (court erred in correcting sentence sua sponte in absence of defendant) with United States v. Rico, supra (court heard arguments on request by government to correct sentence). The Committee contemplates that the court would enter an order correcting the sentence and that such order must be entered within the seven (7) day period so that the appellate process (if a timely appeal is taken) may proceed without delay and without jurisdictional confusion.

Rule 35(c) provides an efficient and prompt method for correcting obvious technical errors that are called to the court's attention immediately after sentencing. But the addition of this subdivision is not intended to preclude a defendant from obtaining statutory relief from a plainly illegal sentence. The Committee's assumption is that a defendant detained pursuant to such a sentence could seek relief under 28 U.S.C. § 2255 if the seven day period provided in Rule 35(c) has elapsed. Rule 35(c) and § 2255 should thus provide sufficient authority for a district court to correct obvious sentencing errors.

The Committee considered, but rejected, a proposal from the Federal Courts Study Committee to permit modification of a sentence, within 120 days of sentencing, based upon new factual information not known to the defendant at the time of sentencing. Unlike the proposed subdivision (c) which addresses obvious

technical mistakes, the ability of the defendant (and perhaps the government) to come forward with new evidence would be a significant step toward returning Rule 35 to its former state. The Committee believed that such a change would inject into Rule 35 a degree of post-sentencing discretion which would raise doubts about the finality of determinate sentencing that Congress attempted to resolve by eliminating former Rule 35(a). It would also tend to confuse the jurisdiction of the courts of appeals in those cases in which a timely appeal is taken with respect to the sentence. Finally, the Committee was not persuaded by the available evidence that a problem of sufficient magnitude existed at this time which would warrant such an amendment.

Rule 46. Release From Custody

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(h) FORFEITURE OF PROPERTY. Nothing in this rule or in chapter 207 of title 18, United States Code, shall prevent the court from disposing of any charge by entering an order directing forfeiture of property pursuant to 18 U.S.C. ~~3142 (c)(2)(K)~~ 3142 (c)(1)(B)(xi) if the value of the property is an amount that would be an appropriate sentence after conviction of the offense charged and if such forfeiture is authorized by statute or regulation.

COMMITTEE NOTE

The amendment is technical. No substantive change is intended.

Rule 54. Application and Exception

(a) COURTS. These rules apply to all criminal proceedings in the United States District Courts; in the District of Guam; in the District Court for the Northern Mariana Islands, except as otherwise provided in articles IV and V of the covenant provided by the Act of March 24, 1976 (90 Stat. 263); in the District Court of the Virgin Islands; and (except as otherwise provided in the Canal Zone) in the United States District Court for the District of the Canal Zone; in the United States Courts of Appeals; and in the Supreme Court of the United States; except that ~~all offenses shall continue to be prosecuted in the District Court of Guam and in the District Court of the Virgin Islands by information as heretofore except such as may be required by local law to be prosecuted by indictment by grand jury.~~ the prosecution of offenses in the District Court of the Virgin Islands shall be by indictment or information as otherwise provided by law.

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COMMITTEE NOTE

The amendment to 54(a) conforms the Rule to legislative changes affecting the prosecution of federal

cases in Guam and the Virgin Islands by indictment or information. The "except" clause in Rule 54(a) addressing the availability of indictments by grand jury Guam has been effectively repealed by Public Law 98-454 (1984), 48 U.S.C. § 1424-4 which made the Federal Rules of Criminal Procedure (including Rule 7, relating to use of indictments) applicable in Guam notwithstanding Rule 54(a). That legislation apparently codified what had been the actual practice in Guam for a number of years. See 130 Cong. Rec., 0. H25476 (daily ed. Sept. 14, 1984). With regard to the Virgin Islands, Public Law 98-454(1984) also amended 48 U.S.C. §§ 1561 and 1614(b) to permit (but not require) use of indictments in the Virgin Islands.

Rule 58. Procedure for Misdemeanors and Other Petty Offenses

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(b) PRETRIAL PROCEDURES.

* * * * *

(A) ~~T~~the charge, and the maximum possible penalties provided by law, including payment of a special assessment under 18 U.S.C. § 3013, and restitution under 18 U.S.C. § 3663;

(d) SECURING THE DEFENDANT'S APPEARANCE; PAYMENT IN LIEU OF APPEARANCE.

* * * * *

(3) Summons or Warrant. Upon an indictmewnt or a showing by one of the other documents specififed in subdivision (b)(1) of probable cause to believe that an offense has been committed and that the defendant has committed it, the court may

issue an arrest warrant or, if no warrant is requested by the attorney for the prosecution, a summons. The showing of probable cause shall be made in writing upon oath or under penalty for perjury, but the affiant need not appear before the court. If the defendant fails to appear before the court in response to a summons, the court may summarily issue a warrant for the defendant's immediate arrest and appearance before the court.

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COMMITTEE NOTE

The amendments are technical. No substantive changes are intended.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE*

Rule 404. Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes

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(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident~~.~~, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

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

COMMITTEE NOTE

Rule 404(b) has emerged as one of the most cited Rules in the Rules of Evidence. And in many criminal cases evidence of an accused's extrinsic acts is viewed as an important asset in the prosecution's case against an accused. Although there are a few reported decisions on use of such evidence by the defense, see, e.g., United States v. McClure, 546 F.2nd 670 (5th Cir. 1990) (acts of informant offered in entrapment defense), the overwhelming number of cases involve introduction of that evidence by the prosecution.

The amendment to Rule 404(b) adds a pretrial notice requirement in criminal cases and is intended to reduce surprise and promote early resolution on the issue of admissibility. The notice requirement thus places Rule 404(b) in the mainstream with notice and disclosure provisions in other rules of evidence. See, e.g., Rule 412 (written motion of intent to offer evidence under rule), Rule 609 (written notice of intent to offer conviction older than 10 years), Rule 803(24) and 804(b)(5) (notice of intent to use residual hearsay exceptions).

The Rule expects that counsel for both the defense and the prosecution will submit the necessary request and information in a reasonable and timely fashion. Other than requiring pretrial notice, no specific time limits are stated in recognition that what constitutes a reasonable request or disclosure will depend largely on the circumstances of each case. Compare Fla. Stat. Ann § 90.404(2)(b) (notice must be given at least 10 days before trial) with Tex. R. Evid. 404(b) (no time limit).

Likewise, no specific form of notice is required. The Committee considered and rejected a requirement that the notice satisfy the particularity requirements normally required of language used in a charging instrument. Cf. Fla. Stat. Ann § 90.404(2)(b) (written disclosure must describe uncharged misconduct with particularity required of an indictment or information). Instead, the Committee opted for a generalized notice provision which requires the prosecution to apprise the defense of the general nature of the evidence of extrinsic acts. The Committee does not intend that the amendment will supercede other rules of admissibility or disclosure, such as the Jencks Act, 18 U.S.C. § 3500,

et. seq. nor require the prosecution to disclose directly or indirectly the names and addresses of its witnesses, something it is currently not required to do under Federal Rule of Criminal Procedure 16.

The amendment requires the prosecution to provide notice, regardless of how it intends to use the extrinsic act evidence at trial, i.e., during its case-in-chief, for impeachment, or for possible rebuttal. The court in its discretion may, under the facts, decide that the particular request or notice was not reasonable, either because of the lack of timeliness or completeness. Because the notice requirement serves as condition precedent to admissibility of 404(b) evidence, the offered evidence is inadmissible if the court decides that the notice requirement has not been met.

Nothing in the amendment precludes the court from requiring the government to provide it with an opportunity to rule in limine on 404(b) evidence before it is offered or even mentioned during trial. When ruling in limine, the court may require the government to disclose to it the specifics of such evidence which the court must consider in determining admissibility.

The amendment does not extend to evidence of acts which are "intrinsic" to the charged offense, see United States v. Williams, 900 F.2d 823 (5th Cir. 1990) (noting distinction between 404(b) evidence and intrinsic offense evidence). Nor is the amendment intended to redefine what evidence would otherwise be admissible under Rule 404(b). Finally, the Committee does not intend through the amendment to affect the role of the court and the jury in considering such evidence. See United States v. Huddleston, -----U.S. -----, 108 S.Ct 1496 (1988).

Rule 1102. Amendments

Amendments in the Federal Rules of Evidence may be made as provided in section ~~2076~~ 2072 of title 28 of the United States Code.

COMMITTEE NOTE

The amendment is technical. No substantive change is necessary.

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

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BANKRUPTCY RULES

January 18, 1991

Honorable Robert E. Keeton
United States District Judge
Room 306, John W. McCormack
Post Office & Courthouse
Boston, MA 02109

Dear Judge Keeton:

The purpose of this letter is to recommend that Bankruptcy Rules 5011(b) and 9027(e) be amended, on an expedited basis, as indicated in Appendix A to this letter. These amendments, which are required by the clear purpose of recent legislation, will enable bankruptcy judges to enter orders regarding certain abstention and remand motions. The Advisory Committee on Bankruptcy Rules has approved these amendments at its meeting on January 17, 1991.

The Advisory Committee recommends that the Standing Committee on Rules of Practice and Procedure approve these amendments at its meeting on February 4, 1991, without publication for public comment, so that they can be approved by the Judicial Conference and adopted by the Supreme Court as part of the comprehensive package of Bankruptcy Rules amendments that will become effective on August 1, 1991.

As you know, on December 1, 1990, the President signed the Judicial Improvements Act of 1990. Title III of the Act ("Implementation of Federal Courts Study Committee Recommendations") includes section 309 which, among other things, amends 28 USC § 1334(c)(2) and 28 USC § 1452(b).

Section 1334(c)(2), which deals with mandatory abstention regarding certain proceedings related to a bankruptcy case, has been amended as follows [new language is underlined]:

"(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action,

related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain or not to abstain made under this subsection is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy."

A similar change has been made to § 1452(b) which deals with remand of a proceeding relating to a bankruptcy case that has been removed to under § 1452(a):

"(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title."

Although a similar amendment has been made to 11 USC § 305 governing abstention from entire bankruptcy cases, there is no Bankruptcy Rule dealing with § 305 motions.

The effect of these statutory amendments is to remove the prohibition of an appeal to the district court of an order of a bankruptcy judge in response to a motion to abstain under 28 USC § 1334(c)(2) or a motion to remand under § 1452(b). The sole purpose of these changes is to permit the bankruptcy court to decide these issues subject to traditional appellate review by the district court. This purpose is set forth in the Federal Courts Study Committee report, the implementation of which is the purpose of Part III of the Judicial Improvements Act:

"The proposed amendment [to 28 USC §§ 1334(c)(2) and 1452(b)] would authorize bankruptcy judges to enter binding orders subject to review in the district court. Speeding the disposition of such motions will better serve the purpose of the limitation on appeals from the district courts to the courts of appeals." Report of the Federal Courts Study Committee, April 2, 1990, page 77.

However, the purpose of these statutory amendments will be frustrated if Bankruptcy Rules 5011(b) and 9027(e) [to be

redesignated as Rule 9027(d) under the proposed 1991 amendments] are not amended to permit the bankruptcy court to enter orders on these motions. Currently, these rules provide that the bankruptcy judge shall make recommendations to the district court on these matters, but may not enter orders. In essence, these motions are now treated the way that non-core matters are treated under Rule 9033. The reason for limiting the bankruptcy judge's role in this manner under the present rules was the concern that it would be inappropriate for a bankruptcy judge to enter binding orders that are not reviewable by an Article III judge. By permitting appellate review by the district court, the recent legislation has removed this concern. Nonetheless, unless and until Rules 5011(b) and 9027(e) are revised to permit bankruptcy judges to enter orders on these matters, the sole purpose of the recent legislation will not be realized.

It is important to note that, technically speaking, these rules are not in direct conflict with the letter of the new legislation, although they are clearly inconsistent with its sole purpose and spirit. It is possible for the bankruptcy judge to make recommendations to the district court in accordance with the present rules, while the statutes provide that the district court's order is not appealable to the court of appeals or Supreme Court. This situation heightens the urgency for changing the rules because we can not find comfort in the belief that lawyers and courts will merely disregard Rules 5011(b) and 9027(e) on the ground that they have been overruled by the recent legislation. The only way to effectuate the clear purpose of the recent legislation is to amend these rules.

The Advisory Committee suggests, therefore, that Rules 5011(b) and 9027(e) be amended to delete the limitation on the bankruptcy judge's role and, instead, to provide that such motions are contested matters governed by Rule 9014. Bankruptcy judges will then treat such abstention and remand motions as core proceedings and will enter orders determining the motions. In addition, Rule 5011(b) should include a provision requiring service of the motion on the parties to the proceeding which is the subject of the abstention motion. Such a provision is already in Rule 9027(e).

We believe that it is important to revise Rules 5011(b) and 9027(e) without the delay that would be caused by publication for public comment. Although we always welcome public comment in connection with rules changes, we believe that the attached revisions are required in view of the recent legislation and that there could not be any controversy from the bench and bar.

I am aware of one instance of precedent for revising, without publication for public comment, a package of rules amendments after it has been approved by the Judicial Conference and prior to Supreme Court promulgation. In 1976, Chapter IX of the former Bankruptcy Act (adjustment of debts of municipalities) was amended substantially by Congress. Prior to

the statutory amendments, the rules package that had been formulated for Chapter IX cases and approved by the Standing Committee and the Judicial Conference had been sent to the Supreme Court for promulgation. After the 1976 legislation, the Reporter to the Advisory Committee on Bankruptcy Rules drafted necessary changes to the rules package and distributed them to the Advisory Committee members by mail for approval. They were then approved, without publication for public comment, by the Standing Committee and the Judicial Conference. The rules package, including the last minute revisions, was forwarded to Congress by the Supreme Court in April of 1976.

I recommend that the same procedure be followed at the present time. If the Standing Committee agrees, the attached amendments to Bankruptcy Rules 5011(b) and 9027(e) [redesignated as Rule 9027(d)] can be submitted to the Judicial Conference at its March 1991 meeting. If the Judicial Conference agrees, these amendments could then be included in the package of Bankruptcy Rule amendments currently before the Supreme Court for promulgation. They could then take effect with that package on August 1, 1991.

Respectfully submitted,

Edward Leavy
Chairman
Advisory Committee on
Bankruptcy Rules

cc: Members of the Standing Committee

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 5011. Withdrawal and Abstention from Hearing a Proceeding

* * * * *

(b) ABSTENTION FROM HEARING A PROCEEDING. ~~Unless a district judge orders otherwise, a~~ A motion for abstention pursuant to 28 U.S.C. § 1334(c) shall be governed by Rule 9014 and shall be served on the parties to the proceeding. ~~heard by the bankruptcy judge, who shall file a report and recommendation for disposition of the motion. The clerk shall serve forthwith a copy of the report and recommendation on the parties to the proceeding. Within 10 days of being served with a copy of the report and recommendation a party may serve and file with the clerk objections prepared in the manner provided in Rule 9033(b). Review of the report and recommendation by the district court shall be governed by Rule 9033.~~

* * * * *

COMMITTEE NOTE

~~The words "with the clerk" in subdivision (b) are deleted as unnecessary. See Rules 5005(a) and 9001(3).~~

Subdivision (b) is amended to delete the restriction that limits the role of the bankruptcy court to the filing of a report and recommendation for disposition of a motion for abstention under 28 U.S.C. § 1334(c)(2). This amendment is consistent with § 309(b) of the Judicial Improvements Act of 1990 which amended § 1334(c)(2) so that it allows an appeal to the district court of a bankruptcy court's order determining an abstention motion. This subdivision is also amended to clarify that the motion is a contested matter governed by Rule 9014 and that it must be served on all parties to the proceeding which is the subject of the motion.

[NOTE: THE ABOVE IS THE COMMITTEE NOTE THAT ACCOMPANIED THE PROPOSED AMENDMENT TO RULE 5011 THAT WAS APPROVED BY THE JUDICIAL CONFERENCE IN SEPTEMBER 1990, SHOWING THE CHANGES RECOMMENDED BY THE ADVISORY COMMITTEE AT THIS TIME]

Rule 9027. Removal

* * * * *

~~(e)~~ (d) REMAND. A motion for remand of the removed claim or cause of action shall be governed by Rule 9014 ~~filed with the clerk~~ and served on the parties to the removed claim or cause of action. ~~Unless the district court orders otherwise, a motion for remand shall be heard by the bankruptcy judge, who shall file a report and recommendation for disposition of the motion. The clerk shall serve forthwith a copy of the report and recommendation on the parties. Within 10 days of~~

~~being served with a copy of the report and recommendation, a party may serve and file with the clerk objections prepared in the manner provided in Rule 9033(b). Review by the district court of the report and recommendation shall be governed by Rule 9033.~~

COMMITTEE NOTE

The abrogation of subdivision (b) is consistent with the repeal of 28 U.S.C. § 1446(d). The changes substituting the notice of removal for the application for removal conform to the 1988 amendments to 28 U.S.C. § 1446.

Rules 7008(a) and 7012(b) were amended in 1987 to require parties to allege in pleadings whether a proceeding is core or non-core and, if non-core, whether the parties consent to the entry of final orders or judgment by the bankruptcy judge. Subdivision (a)(1) is amended and subdivision (f)(3) is added to require parties to a removed claim or cause of action to make the same allegations. The party filing the notice of removal must include the allegation in the notice, and the other parties who have filed pleadings must respond to the allegation in a separate statement filed within 10 days after removal. However, if a party to the removed claim or cause of action has not filed a pleading prior to removal, there is no need to file a separate statement under subdivision (f)(3) because the allegation must be included in the responsive pleading filed pursuant to Rule 7012(b).

Subdivision (e), redesignated as subdivision (d), is amended to delete the restriction that limits the role of the bankruptcy court to the filing of a report and recommendation for disposition of a motion for remand under 28 U.S.C. § 1452(b). This amendment is consistent with § 309(c) of the Judicial Improvements Act of 1990, which amended § 1452(b) so that it allows an appeal to

the district court of a bankruptcy court's order determining a motion for remand. This subdivision is also amended to clarify that the motion is a contested matter governed by Rule 9014. The words "filed with the clerk" ~~in subdivision (c), redesignated as subdivision (d),~~ are deleted as unnecessary. See Rules 5005(a) and 9001(3).

[NOTE: THE ABOVE IS THE COMMITTEE NOTE THAT ACCOMPANIED THE PROPOSED AMENDMENT TO RULE 9027 THAT WAS APPROVED BY THE JUDICIAL CONFERENCE IN SEPTEMBER 1990, SHOWING THE CHANGES RECOMMENDED BY THE ADVISORY COMMITTEE AT THIS TIME]