SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

1. Approve proposed new Criminal Rule 32.2 and amendments to Criminal Rules 7, 31, 32, and 38 and transmit them after the Conference's September session to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 5-12

2. Approve and transmit in accordance with H. R. Conf. Rep. No. 825, 105 Cong. 2d Sess. 1071 (1998), to the Committees on Appropriations a report containing its findings and recommending that Rule 6(d) of the Federal Rules of Criminal Procedure not be amended at this time to allow a witness appearing before the grand jury to have counsel present ..... pp. 12-13

The remainder of the report is submitted for the record, and includes the following items for the information of the Conference:

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure met on January 7-8, 1999. All the members attended the meeting, except Judge Phyllis A. Kravitch. The Department of Justice was represented by Neal K. Katyal, Advisor to the Deputy Attorney General and Roger A. Pauley, Criminal Division, Director, Office of Legislation.

Representing the advisory rules committees were: Judge Will L. Garwood, chair, of the Advisory Committee on Appellate Rules; Judge Adrian G. Duplantier, chair, and Professor Alan N. Resnick, reporter, of the Advisory Committee on Bankruptcy Rules; Judge Paul V. Niemeyer, chair, and Professor Edward H. Cooper, reporter, of the Advisory Committee on Civil Rules; Judge W. Eugene Davis, chair, and Professor David A. Schlueter, reporter, of the Advisory Committee on Criminal Rules; and Judge Fern M. Smith, chair, and Professor Daniel J. Capra, reporter, of the Advisory Committee on Evidence Rules.

Participating in the meeting were Peter G. McCabe, the Committee's secretary; Professor Daniel R. Coquillette, the Committee's reporter; John K. Rabiej, chief, and Mark D. Shapiro, deputy chief of the Administrative Office's Rules Committee Support Office; Marie Leary of the Federal Judicial Center; Professor Mary P. Squiers, Director of the Local Rules Project; and Joseph F. Spaniol, consultant to the Committee.

FEDERAL RULES OF APPELLATE PROCEDURE

The Advisory Committee on Appellate Rules determined that — barring an emergency — no amendment to the rules will be forwarded until the bench and bar have become accustomed to the comprehensive revision of the appellate rules. The restyled appellate rules took effect on December 1, 1998.

At its September 1998 meeting, the advisory committee considered several new proposed rules amendments. It approved amendments to four rules. But in accordance with its earlier decision to defer submitting proposed amendments, the advisory committee retained them and will transmit them to the Committee at a later date.

The advisory committee presented no items for the Committee's action.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

The Advisory Committee on Bankruptcy Rules also presented no items for the Committee's action.

The advisory committee is reviewing comments submitted on a preliminary draft of proposed amendments to 31 bankruptcy rules and two forms published in August 1998 for public comment. The proposed changes were divided into two parts, a "litigation" package consisting of amendments to 27 rules, and other amendments consisting of miscellaneous amendments to six rules. The proposed changes in the litigation package would substantially revise the rules governing litigation in bankruptcy cases, other than in adversary proceedings.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee on Civil Rules proposed amendments to Rules 65 and 81, and the abrogation of the Copyright Rules of Practice, with a recommendation that they be published

for public comment. The Copyright Rules of Practice were prescribed by the Supreme Court and are set out in 17 U.S.C.A. following § 501. They deal only with prejudgment seizure of copies alleged to infringe a copyright. The rules were written for the 1909 Copyright Act and have not been changed to reflect inconsistent provisions in the 1976 Copyright Act. They do not conform to modern concepts of due process. In 1964 the advisory committee challenged the seizure procedure as one that:

> is rigid and virtually eliminates discretion in the court; it does not require the plaintiff to make any showing of irreparable injury as a condition of securing the interlocutory relief; nor does it require the plaintiff to give notice to the defendant of an application for impounding even when an opportunity could feasibly be provided.

These problems prompted the advisory committee in 1964 to recommend that the Copyright Rules be abrogated and that Civil Rule 65 be amended to provide an impoundment procedure for articles involved in an alleged copyright infringement. The recommendation was withdrawn because Congress was considering a thorough revision of the copyright laws that was eventually enacted in 1976.

The advisory committee actively solicited comment in 1997 from organizations and experienced counsel on the need to update the Copyright Rules. The advisory committee notified staff of the House Judiciary Subcommittee on Courts and Intellectual Property of its intent to recommend that the Copyright Rules be abrogated. Representative Howard Coble (R-NC), chairman of the subcommittee, expressed concern that any proposed amendment might interfere with pending copyright legislation and ongoing United States multilateral treaty obligations. The United States has been actively encouraging all countries to provide effective intellectual property protections. At Chairman Coble's request, the advisory committee deferred recommending publication of the proposals for one year.

During the one-year delay, Congress acted on pending measures. The advisory committee has now returned to the subject and has concluded that the Copyright Rules should be abrogated and Civil Rule 65 be amended to expressly govern impoundment proceedings. Under the proposed amendments, impoundment may still be ordered on an ex parte basis if the applicant makes a strong showing of the reasons why notice is likely to defeat effective relief. But the proposed changes would eliminate the concerns that the rules may be invalid and will help ensure that the judiciary is in compliance with its international obligations.

The Committee approved publication of the advisory committee's proposals. Amendments to Rule 81 are proposed to conform to the abrogation of the Copyright Rules, to eliminate an outdated reference to mental heath proceedings, and to improve the reference to the Bankruptcy Rules.

Rules Published for Comment

The advisory committee is reviewing comments submitted on proposed amendments to seven civil rules and three admiralty rules published in August 1998 for public comment. The proposed changes amend several provisions in the discovery rules. A public hearing was held on the proposed amendments in Baltimore on December 7, 1998, and two January hearings are scheduled in San Francisco and Chicago.

Mass Torts Project

The Chief Justice has approved the establishment of an informal working group to study mass torts under the leadership of the advisory committee. A draft report was prepared and circulated among the various relevant Judicial Conference committees. The group plans to submit a report by February 15, 1999.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval

The Advisory Committee on Criminal Rules submitted a proposed new Rule 32.2 and conforming amendments to Rules 7, 31, 32, and 38 together with Committee Notes explaining their purpose and intent. The proposed amendments were circulated to the bench and bar for comment in August 1997. A public hearing was held in Washington, D.C.

The proposed new Rule 32.2 (Forfeiture Procedures) would establish a comprehensive set of forfeiture procedures, consolidating several procedural rules (i.e., Rules 7, 31, 32, and 38) governing the forfeiture of assets in a criminal case. Under the proposed amendments, the nexus between the property to be forfeited and the offense committed by the defendant would be established during the first stage of the proceedings as part of the sentencing. In the second stage, procedures governing ancillary proceedings are prescribed to determine the claims of any third party asserting an interest in the property.

Background

The advisory committee has been studying the amendments for three years. Under the original proposal published for comment, the trial judge alone determined if the property is subject to forfeiture. In light of the public comments and the discussion at the Standing Rules Committee's June 1998 meeting regarding this aspect of the proposal, the advisory committee reconsidered and revised the amendments at its October 1998 meeting to retain a limited role for the jury. The advisory committee also made changes to several other provisions, including recognition of a form of forfeiture involving the entry of a personal money judgment against the defendant. Ultimately, the advisory committee voted unanimously to approve the amendments and forward them to the Standing Rules Committee.

The National Association of Criminal Defense Lawyers (NACDL) submitted a memorandum opposing the proposed rule on a number of grounds. NACDL's objections were considered by the Standing Rules Committee. For the most part, the objections reiterated positions previously taken by NACDL at the public hearing and reflected its disagreement with the recent characterization of criminal forfeiture by the Supreme Court as an aspect of sentencing (see below), and its logical implications for the types of procedures that are appropriate.

NACDL also expressed the view that the new rule should not endorse personal judgment forfeiture, which may include, for example, a judgment for the amount of money derived from a drug trafficking offense or the amount involved in a money laundering offense where the actual property subject to forfeiture has not been found or is unavailable. Several circuits have recognized this type of forfeiture (none has held to the contrary), although the Supreme Court has not addressed the matter. The advisory committee believed that it was appropriate to include a mechanism to address personal money judgments as guidance for those courts that do recognize this type of forfeiture. The Standing Rules Committee agreed, but voted to insert an explanatory statement in the Committee Note indicating that the Committee takes "no position" on the correctness of the lower court rulings approving personal money judgment forfeitures. The Standing Rules Committee then voted unanimously to approve the proposed rule and Committee Note.

Need for a Rule Amendment

The need for an amendment in this area arises primarily from two factors. First, the number of criminal forfeiture proceedings is already large (about 1,700 cases per year) and has been steadily growing. But there is no uniform set of procedures to regulate the proceedings, and practices and case law vary widely. Second, what current structure does exist is based on a

premise recently determined by the Supreme Court to be erroneous. Contrary to the assumption in the present rules, the Supreme Court held in *Libretti v. United States*, 116 S. Ct. 356 (1995), that criminal forfeiture is not an element of the offense but rather an aspect of sentencing. The Court's holding calls into question many of the procedures and standards now governing forfeiture proceedings.

All criminal forfeitures are executed under statutory authorizations. Congress has enacted and continues to enact statutes authorizing forfeiture in criminal cases, although a majority of the forfeitures are pursued under one of two statutes — 18 U.S.C. §§ 981-82 or 21 U.S.C. § 881. The underlying forfeiture statutes recognize the right of a third party to assert an interest in the forfeited property, but they do not contain specific procedures to adjudicate the claims. In addition to the large number of forfeiture statutes, the procedures governing forfeiture proceedings are scattered in the Federal Rules of Criminal Procedure and provide limited guidance to the courts.

This patchwork of authorizing forfeiture statutes and procedural rules has led to much confusion. The situation has been aggravated by the enactment of an increasing number of statutes authorizing forfeiture and the growing reliance by the government on forfeiture as a prosecutorial tool.

The advisory committee had been studying the advantages of a new single rule governing procedures in forfeiture proceedings that would clarify the process and begin to establish a uniform practice in the federal courts governing the adjudication of claims of third parties who assert an interest in the forfeited property. The decision of the Supreme Court in *Libretti v. United States* fundamentally altered the legal landscape of forfeiture proceedings prompting the advisory committee to actively undertake the amendment process.

Jury's Role in Forfeiture Proceedings

The principal change in the rule prompted by *Libretti* deals with the jury's role in the forfeiture decisionmaking. Rule 31(e) now requires the jury to determine in a special verdict the "extent of the [defendant's] interest or property subject to forfeiture." The provision is no longer warranted on practical or jurisprudential grounds. The Committee Note to Rule 31(e) states that: "the assumption of the draft is that the amount of the interest or property subject to criminal forfeiture is an element of the offense to be alleged and proved." *Libretti* found otherwise, effectively undoing the provision's underpinnings.

Neither is the provision needed on practical grounds, because it has been superseded by legislative developments. The Rule 31(e) procedure, which requires a special verdict determining the defendant's interest in the property, had been helpful (although not infallible) in ascertaining whether a third party had a claim to the property. (For example, a jury's finding that the defendant owned a one-half share in the property meant by definition that some other party owned the remainder.) But in 1984, Congress enacted legislation that established a specific post-trial, ancillary proceeding to identify and determine whether any third party had an interest in the forfeited property. The notice provisions in this procedure, which alert third parties of the property subject to forfeiture, are similar to those required in forfeiture proceedings in civil cases.

The 1984 legislation established a specific procedure that safeguarded the property rights of third parties better than the protections indirectly afforded to them under Rule 31(e). But it also created an inefficient process. The courts now must conduct a "second" (ancillary) proceeding to determine the ownership of forfeitable property after they have completed an initial forfeiture proceeding in the underlying criminal trial. The ancillary proceeding often duplicates and sometimes vitiates work done by the jury in the original trial. This inefficiency has led courts

to interpret the scope of Rule 31(e) differently to ameliorate the jury's burden. Some courts have asked the jury only to determine whether the property is forfeitable, while other courts ask the jury to determine whether the defendant has a legal interest in the property. But some courts require the jury to determine the extent of the defendant's interest in the property in relation to third parties. The various standards have created confusion and wasteful litigation made unnecessary by *Libretti*.

The proposed rule streamlines and clarifies forfeiture proceedings by eliminating the requirement that the jury determine the extent of the defendant's interests in the forfeitable property. Although the advisory committee concluded that *Libretti* removed the jury from the forfeiture considerations entirely, the Standing Rules Committee was concerned over the total elimination of the jury as a matter of policy. It found that *Libretti* did not compel this result. The proposal was revised to now read that at the request of the government or the defendant, the jury decides (only) whether the requisite nexus between the property and the offense committed by the defendant has been established. The rights of third parties asserting an interest in the property remain safeguarded in the ancillary proceeding.

Third-Party Claims

Rule 32(d)(2) now governs ancillary forfeiture proceedings. But it provides limited guidance on what procedures govern. Experience has shown that ancillary hearings can involve issues of enormous complexity that require years to resolve. Courts have struggled deciding which procedures — often involving questions regarding the scope and extent of discovery — govern in a particular case. The new Rule 32.2(c) sets out a national uniform procedure that references discovery and other procedures in the Federal Rules of Civil Procedure. These include, for example, 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. This practice follows the prevailing case law.

Under the proposed amendments, the trial jury's burden will be significantly lessened and the overall efficiency of the forfeiture procedures enhanced without jeopardizing the rights of third parties who assert an interest in the property.

Summary of Rule 32.2. Provisions

Subdivision (a) is derived from Rule 7(c)(2) and 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.

Subdivision (b)(1) 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." Under the new provision the court determines (subject to a later jury request) whether the requisite nexus between the forfeited property and the offense committed by the defendant has been established.

Subdivisions (b)(2)-(3) provide that once the trial judge enters a preliminary order of forfeiture, the government may seize the property and conduct any appropriate discovery permitted by the court. At sentencing, the order of forfeiture becomes final as to the defendant and must be included as part of the sentence.

Subdivision (b)(4) provides that, in a case in which a jury has returned a guilty verdict, either party may elect to have the jury determine whether the requisite nexus between the property and the offense committed by the defendant exists. This preserves a limited role for the jury in criminal forfeiture proceedings as a matter of policy.

Subdivision (c) sets forth procedures governing the conduct of ancillary proceedings (which by statute are before the court alone) at which the rights of any third parties asserting an interest in the property to be forfeited are determined. In preparation for the proceeding, the court may permit the parties to conduct discovery under the Civil Rules. After the proceeding, the court enters a final order of forfeiture disposing of any third-party claim. Since no third party can have an interest in a personal money judgment order against the defendant, subdivision (c) is inapplicable to such orders. As previously noted, the Committee takes no position on the correctness of rulings approving the entry of a personal money judgment forfeiture order.

If no third party files a claim, no ancillary hearing is held. The preliminary order of forfeiture becomes the final order, provided the court determines that any defendant convicted in the case had an interest in the property.

Subdivision (d) replaces the forfeiture provisions of Rule 38(e). The new subdivision provides that the court may stay an order of forfeiture pending appeal 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.

Subdivision (e) clarifies that the court retains jurisdiction to amend the order of forfeiture to include substitute assets at any time.

The Committee concurred unanimously with the advisory committee's recommendations. The Committee recommends that the amendments be transmitted to the Supreme Court after the September 1999 session of the Judicial Conference so that the Court has adequate time to review it. The proposed amendments to the Federal Rules of Criminal Procedure, as recommended by your committee, are in Appendix A together with an excerpt from the advisory committee report.

Recommendation: That the Judicial Conference approve proposed new Criminal Rule 32.2 and amendments to Criminal Rules 7, 31, 32, and 38 and transmit them after the Conference's September session to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Legislation Allowing Counsel to Accompany a Witness into the Grand Jury Room

H.R. Conf. Rep. No. 825, 105 Cong. 2d Sess. 1071 (1998), directs the Judicial Conference to report its findings on a study determining whether Criminal Rule 6 should be amended to allow a witness appearing before a grand jury to have counsel present to the Committees on Appropriations not later than April 15, 1999. The report accompanied the Omnibus Appropriations Act (Pub. L. No. 105-277), which was passed late in the last congressional session. The Advisory Committee on Criminal Rules immediately began to work on this matter in late November when it first was notified of the congressional request. It submitted a report to the Standing Rules Committee shortly before its January 7-8, 1999, meeting.

The advisory committee reviewed extensive historical records that dealt with earlier actions of the committee on proposals similar to the one now under consideration. It also reviewed contemporaneous articles and letters on the issue from bar organizations, which are described in its report. Based on the earlier comprehensive examination of this issue and the shared experiences of its members, the advisory committee recommended that no action be taken at this time to amend Rule 6(d) of the Federal Rules of Criminal Procedure. The Standing Rules Committee agreed with the advisory committee's recommendation, and it recommends that the Judicial Conference adopt the report submitted by the advisory committee, which is attached as Appendix B.

Recommendation: That the Judicial Conference approve and transmit in accordance with H.R. Conf. Rep. No. 825, 105 Cong. 2d Sess. 1071 (1998), to the Committees on Appropriations a report containing its findings and recommending that Rule 6(d) of the Federal Rules of Criminal Procedure not be amended at this time to allow a witness appearing before a grand jury to have counsel present.

FEDERAL RULES OF EVIDENCE

The Advisory Committee on Evidence Rules is reviewing comments submitted on a preliminary draft of proposed amendments to seven evidence rules published in August 1998 for public comment. The proposed changes amend the rules governing the admission of testimony of experts, in limine rulings, and record authentication. A public hearing was held on the proposed amendments in Washington, D.C. on October 22, 1998. An additional hearing is scheduled in San Francisco.

The advisory committee appointed a subcommittee to consider whether the committee should attempt to propose a codification of privileges in light of the substantial recent congressional activity in this area. The advisory committee will consider the matter at its April 1999 meeting.

RULES GOVERNING ATTORNEY CONDUCT

The Standing Committee reviewed several specific proposals providing uniformity in rules governing attorney conduct. Options presented to the committee included a general default provision that relies on the applicable state law, and the default provision combined with a set of "core" national rules. A subcommittee consisting of members from each of the advisory committees was formed and will meet in May 1999 to make recommendations to the respective advisory committees.

FINANCIAL REPORTING RULE AMENDMENTS

At the request of the Committee on Codes of Conduct, the advisory committees considered changes to their respective rules requiring parties to disclose certain financial interests so that a trial judge could ascertain whether recusal under the law was necessary. The request was received shortly before the advisory committee fall meetings, so that only preliminary discussions of the issues were possible. The Committee discussed several ways to coordinate a common set of amendments among the advisory committees. The advisory committees will continue to consider this issue at their respective spring meetings.

Respectfully submitted,

Anthony J. Scirica
Chair

Frank W. Bullock
Charles J. Cooper
Geoffrey C. Hazard, Jr.
Gene W. Lafitte
Patrick F. McCartan
James A. Parker
Sol Schreiber
Morey L. Sear
A. Wallace Tashima
E. Norman Veasey
William R. Wilson, Jr.

Appendix A — Proposed Amendments to the Federal Rules of Criminal Procedure
Appendix B — Report to the Committees on the Appropriations on Proposed Amendments to Criminal Rule 6(d)

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

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CIVIL RULES

W. EUGENE DAVIS
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

TO: Hon. Anthony J. Scirica, Chair
Standing Committee on Rules of Practice and Procedure

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

SUBJECT: Report of the Advisory Committee on Criminal Rules

DATE: December 3, 1998

I. Introduction

The Advisory Committee on the Rules of Criminal Procedure met on October 19 and 20, 1998 at Cape Elizabeth, Maine and took action on a number of proposed amendments. The draft Minutes of that meeting are included at TAB D. This report addresses matters discussed by the Committee at that meeting.

First, the Committee reconsidered its proposed new to Rule 32.2, dealing with criminal forfeiture procedures. As noted in the following discussion, the Advisory Committee proposes that the revised Rule 32.2 be approved by the Committee and forwarded to the Judicial Conference.

Second, if the Committee approves new Rule 32.2, conforming amendments should also be approved to Rules 7 (The Indictment and Information), Rule 31 (Verdict), Rule 32 (Sentence and Judgment), and Rule 38 (Stay of Execution).

* * * * *

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. One of those Rules 32.2 was a new rule designed to bring together in one rule the procedures associated with criminal forfeitures. That Rule, which generated a number of written comments and testimony, was presented to the Standing Committee at its Santa Fe meeting in June 1998. The Standing Committee discussed the Rule and eventually voted not to approve the Rule for transmission to the Judicial Conference.

The Committee has reconsidered Rule 32.2 and at its meeting in October approved a modified Rule that addresses the concerns raised by members of the Standing Committee. The following discussion briefly summarizes the changes to proposed Rule 32.2 and the conforming amendments to other Rules of Criminal Procedure.

1. ACTION ITEM—Rule 32.2. Forfeiture Procedures.

a. Background of Rule 32.2.

The Committee proposes adoption of Rule 32.2, a new rule dedicated solely to the question of forfeiture proceedings. As noted in the our report to the Standing Committee in June, over the last several years the Committee has discussed the problems associated with 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). As initially published and presented to this Committee, the Rule eliminated that right to have jury decide those issues. That position was based upon the Advisory Committee's reading of *Libretti v. United States*, 116 S.Ct. 356 (1995), in which 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.

As noted at the Standing Committee's last meeting, the Advisory Committee had received only six written comments and most of those supported the Rule. The NADCL adamantly opposed the proposed rule, and provided two witnesses who testified before the Committee. Their key point was that the new rule abrogated the critical right to a jury trial. Under the draft presented to the Standing Committee in June, the jury's role would have been eliminated and the court would have initially decided whether the defendant had 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.

b. Action on Rule 32.2 by Standing Committee in June 1998.

At its June 1998 meeting, the Standing Comment disapproved Rule 32.2. Most of the discussion had focused on two key issues: Abrogation of the jury's role in forfeiture proceedings and the ability of the defendant to present evidence at the post-verdict hearing. There was also some question about making style changes to portions of the Rule.

c. Reconsideration of Rule 32.2 by Advisory Committee.

Following the Standing Committee's action on the Rule, a Rule 32.2 Subcommittee of the Advisory Committee considered proposed changes submitted by the Department of Justice and at its October 1998 meeting, recommended to the Advisory Committee that Rule 32.2 be revised and resubmitted to the Standing Committee. The revisions included restoration of the jury's role in determining nexus in forfeiture proceedings (Rule 32.2(b)(4)) and clarified that both the government and the defense may present evidence at the post-verdict hearing to determine if there is a nexus between the property to be forfeited and the offense for

which the defendant has been found guilty (Rule 32.2(b)(2)).

d. Summary of Changes in Rule 32.2 Following Standing Committee Meeting.

Rule 32.2 has been changed to reflect current caselaw interpreting Rule 7(c) which does not require a substantive allegation that certain property is subject to forfeiture. The defendant need only receive notice that the government will be seeking forfeiture under the applicable statute. A comparison chart is at TAB B.

Rule 32.2(b)(1) has been revised to clarify that there are different kinds of forfeiture judgments: forfeiture of specific assets and money judgments. To the extent that the case involves forfeiture of specific assets, the court or jury must find a nexus between the property and the crime for which the defendant has been found guilty.

Under revised Rule 32.2(b)(2), the Rule makes it clear that what is deferred to the ancillary proceeding is the question of whether any third party has a superior interest in the property. Former language regarding what the court should do if no party files a claim has been moved to (c)(2).

Rule 32.2(b)(3) had been changed to make it clear that the Attorney General could designate someone outside the Department to seize the forfeited property.

The major change, rests in Rule 32.2(b)(4) which retains the right of either the defendant or the government to request that the jury make the decision whether there is a nexus between the property and the crime. This provision was designed specifically to address the concerns raised by some members of the Standing Committee.

Rule 32.2(c)(1) has been revised to reflect that no ancillary proceeding is necessary regarding money judgments and (c)(2) had been revised to simplify what had appeared at (b)(2) in the original version. Subdivision (c)(2) preserves two tenets of current law: that criminal forfeiture is an in personem action and that

if no third party files a claim to the property, his or her rights are extinguished. Under the revised Rule, if no third party files a claim the court is not required to determine the extent of the defendant's interest. It is only required to decide whether the defendant had an interest in the property.

Rule 32.2(e)(1) has been revised to make it clear that the right to a bifurcated procedure does not apply to forfeiture of substitute assets or to the addition of newly-discovered property to an existing forfeiture order.

e. Style Changes to Revised Rule 32.2

In redrafting Rule 32.2, the Advisory Committee considered the suggested style changes submitted by the Style Subcommittee. Most of those changes have been incorporated into the Rule and Comment. A number of the suggestions, however, would have resulted in what the Department of Justice considered to be substantive changes. The suggested style changes and the Department's response are attached at TAB C, infra, following this Report.

Recommendation--The Committee recommends that Rule 32.2 be approved as amended 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 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.

4. 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.

5. 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.

B. Text of Proposed Amendments; Summary of Comments and

GAP Reports.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

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~~ provides notice 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.

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

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 initially made no changes to the published draft of the Rule 7 amendment. However, because of changes to Rule 32.2(a), discussed supra, the proposed language has been changed to reflect that the indictment must provide notice of an intent to seek forfeiture.

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).

32.2. Criminal Forfeiture

(a) NOTICE TO THE DEFENDANT. A court shall not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute.

(b) ENTRY OF PRELIMINARY ORDER OF FORFEITURE; POST VERDICT HEARING.

(1) As soon as practicable after entering a guilty verdict or accepting a plea of guilty or *nolo contendere* on any count in an indictment or information with regard to which criminal forfeiture is sought, the court shall determine what property is

subject to forfeiture under the applicable statute. If forfeiture of specific property is sought, the court shall determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment against the defendant, the court shall determine the amount of money that the defendant will be ordered to pay. The court's determination may be based on evidence already in the record, including any written plea agreement or, if the forfeiture is contested, on evidence or information presented by the parties at a hearing after the verdict or finding of guilt.

(2) If the court finds that property is subject to forfeiture, it shall promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment or directing the forfeiture of specific property without regard to any

third party's interest in all or part of it. Determining whether a third party has such an interest shall be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).

(3) The entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence proceedings that comply with any statutes governing 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 conditions

reasonably necessary to preserve the property's value pending any appeal.

(4) Upon a party's request in a case in which a jury returns a verdict of guilty, the jury shall determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.

(c) ANCILLARY PROCEEDING; FINAL ORDER OF FORFEITURE.

(1) If, as prescribed by statute, a third party files a petition asserting an interest in the property to be forfeited, the court shall conduct an ancillary proceeding but no ancillary proceeding is required to the extent that the forfeiture consists of a money judgment.

(A) In the ancillary proceeding, the court may, on motion, dismiss the petition for

lack of standing, for failure to state a claim, or for any other lawful reason. For purposes of the motion, the facts set forth in the petition are assumed to be true.

(B) After disposing of any motion filed under Rule 32.2(c)(1)(A) and before conducting a hearing on the petition, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure if the court determines that discovery is necessary or desirable to resolve factual issues. When discovery ends, a party may move for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

(2) When the ancillary proceeding ends, the court shall enter a final order of forfeiture by amending the preliminary order as necessary to

account for any third party rights. If no third party files a timely claim, the preliminary order becomes the final order of forfeiture, if the court finds that the defendant (or any combination of defendants convicted in the case) had an interest in the property that is forfeitable under the applicable statute. 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 codefendant or third party, nor may a third party object to the final order on the ground that the third party had an interest in the property.

(3) If multiple third-party petitions are filed in the same case, an order dismissing or granting one petition is not appealable until rulings are made on all petitions, unless the court determines that there is no just reason for delay.

(4) An ancillary proceeding is not part of sentencing.

(d) STAY PENDING APPEAL. If a defendant appeals from a conviction or order of forfeiture, the court may stay the order of forfeiture on terms appropriate to ensure that the property remains available pending appellate review. A stay does not delay the ancillary proceeding or the determination of a third party's rights or interests. If the court rules in favor of any third party while an appeal is pending, the court may amend the order of forfeiture but shall not transfer any property interest to a third party until the decision on appeal becomes final, unless the defendant consents in writing or on the record.

(e) SUBSEQUENTLY LOCATED PROPERTY; SUBSTITUTE PROPERTY.

(1) On the government's motion, the court may at any time enter an order of forfeiture or amend

an existing order of forfeiture to include property that:

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

(B) is substitute property that qualifies for forfeiture under an applicable statute.

(2) If the government shows that the property is subject to forfeiture under Rule 32.2(e)(1), the court shall:

(A) enter an order forfeiting that property, or amend an existing preliminary or final order to include it; and

(B) if a third party files a petition claiming an interest in the property, conduct an ancillary proceeding under Rule 32.2(c).

(3) There is no right to trial by jury under Rule 32.2(e).

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.

Subdivision (a). Subdivision (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, subdivision (a) is not intended to require that an itemized list of the property to be forfeited appear in the indictment or information itself. The subdivision reflects the trend in caselaw interpreting present Rule 7(c). Under the most recent cases, Rule 7(c) sets forth a requirement that the government give the defendant notice that it will be seeking forfeiture in accordance with the applicable statute. It does not require a substantive allegation in which the property subject to forfeiture, or the defendant's interest in the property, must be described in detail. *See United States v. DeFries,* 129 F.3d 1293 (D.C.Cir. 1997) (it is not necessary to specify in either the indictment or a bill of particulars that the government is seeking forfeiture of a particular asset, such as the defendant's salary; to comply with Rule 7(c), the government need only put the defendant on notice that it will seek to forfeit everything subject to forfeiture under the applicable statute, such as all property "acquired or maintained" as a result of a

RICO violation). *See also 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); *United States v. Voigt*, 89 F.3d 1050 (3rd Cir. 1996) (court may amend order of forfeiture at any time to include substitute assets).

Subdivision (b) Subdivision (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 right to jury on forfeiture issues).

One problem under 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 impanel 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 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 forfeited property.

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 that 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. This 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 (or a jury) 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, if under the current rule the court were to find that A is the true owner of the property, then B would have 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 (1st 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 or finding of guilty 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 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. Subdivision (b)(2) provides that it is not 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.

Subdivision (b)(1) recognizes that there are different kinds of forfeiture judgments in criminal cases. One type is a personal judgment for a sum of money; another is a judgment forfeiting a specific asset. *See, e.g., United States v. Voigt*, 89 F.3d 1050 (3d Cir. 1996) (government is entitled to a personal money judgment equal to the amount involved in the money laundering offense, as well as order forfeiting specific assets involved in, or traceable to, the offense; in addition, if the statutory requirements are met, the government may be entitled to forfeit substitute assets); *United States v. Cleveland*, 1997 WL 537707 (E.D. La. 1997) (government entitled to a money judgment equal to the amount of money defendant

laundered in money laundering case). The finding the court is required to make will depend on the nature of the forfeiture judgment. A number of cases have approved use of money judgment forfeitures. The Committee takes no position on the correctness of those rulings.

To the extent that the government is seeking forfeiture of a particular asset, such as the money on deposit in a particular bank account that is alleged to be the proceeds of a criminal offense, or a parcel of land that is traceable to that offense, the court must find that the government has established the requisite nexus between the property and the offense. To the extent that the government is seeking a money judgment, such as a judgment for the amount of money derived from a drug trafficking offense or the amount involved in a money laundering offense where the actual property subject to forfeiture has not been found or is unavailable, the court must determine the amount of money that the defendant should be ordered to forfeit.

The court may make the determination based on evidence in the record, or on additional evidence submitted by the defendant or evidence submitted by the government in support of the motion for the entry of a judgment of forfeiture. The defendant would have no standing to object to the forfeiture on the ground that the property belonged to someone else.

Under subdivision (b)(2), if the court finds that property is forfeitable, it must enter a preliminary order of forfeiture. It also recognizes that any determination of a third person's interest in the property is deferred until an ancillary proceeding, if any, is held under subdivision (c).

Subdivision (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. The subdivision also provides that the Attorney General may designate someone outside of the Department of Justice to seize forfeited property. This is necessary because in cases in which the lead investigative agency is in the Treasury Department, for example, the seizure of the forfeited property is typically handled by agencies other than the Department of Justice..

If no third party files a claim, the court, at the time of sentencing, will enter a final order forfeiting the property in accordance with subdivision (c)(2), discussed *infra*. 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 the order of forfeiture becomes final as to the defendant at the time of sentencing, his right to appeal from that order begins to run at that time. As courts have held, because the ancillary hearing has no bearing on the defendant's right to the property, the defendant has no right to appeal when a final order is, or is not, amended to recognize third party rights. *See, e.g.*, United States v. Christunas, 126 F.3d 765 (6th Cir. 1997) (preliminary order of forfeiture is final as to the defendant and is immediately appealable).

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.

Subdivision (b)(4) addresses the right of either party to request that a jury make the determination of whether any property is subject to forfeiture. The provision gives the defendant, in all cases where a jury has returned a guilty verdict, the option of asking that the jury be retained to hear additional evidence regarding the forfeitability of the property. The only issue for the jury in such cases would be whether the government has established the requisite nexus between the property and the offense. For example, if the defendant disputes the government's allegation that a parcel of real property is traceable to the offense, the defendant would have the right to request that the jury hear evidence on that issue, and return a special verdict, in a bifurcated proceeding that would occur after the jury returns the guilty verdict. The government would have the same option of requesting a special jury verdict on this issue, as is the case under current law. *See* Rule 23(a) (trial by jury may be waived only with the consent of the government).

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. Voigt*, 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).

Although an argument could be made under *Libretti*, that a jury trial is no longer appropriate on any aspect of the forfeiture issue, which is a part of sentencing, the Committee decided to retain the right for the parties, in a trial held before a jury, to have the jury determine whether the government has established the requisite statutory nexus between the offense and the property to be forfeited. The jury, however, would not have any role in determining whether a defendant had an interest in the property to be forfeited. This is a matter for the ancillary proceeding which, by statute, is conducted "before the court alone, without a jury." *See* 21 U.S.C. § 853(n)(2).

Subdivision (c). Subdivision (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. Subdivision (c)(1) makes clear that no ancillary proceeding is required to the extent that the order of forfeiture consists of a money judgment. A money judgment is an *in personam* judgment against the defendant and not an order directed at specific assets in which any third party could have any interest.

Experience has shown 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*, CR-85-00756 (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 connected to 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). *See also United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Banque Indosuez)*, 961 F.Supp. 282 (D.D.C. 1997) (in resolving motion to dismiss court assumes all facts pled by third party petitioner to be true, applying Rule 12(b)(6) and denying government's motion because whether claimant had superior title turned on factual dispute; government acted reasonably in not making any discovery requests in ancillary proceeding until court ruled on its motion to dismiss).

Subdivision (c)(2) provides for the entry of a final order of forfeiture at the conclusion of the ancillary proceeding. Under this provision, if no one files a claim in the ancillary proceeding, the preliminary order would become the final order of forfeiture, but the court would first have to make an independent finding that at least one of the defendants had an interest in the property such that it was proper to order the forfeiture of the property in a criminal case. In making that determination, the court may rely upon reasonable inferences. For example, the fact that the defendant used the property in committing the crime and no third party claimed an interest in the property may give rise to the inference that the defendant had a forfeitable interest in the property.

This subdivision combines and preserves two established tenets of current law. One is that criminal forfeitures are *in personam* actions that are limited to the property interests of the defendant. (This distinguishes criminal forfeiture, which is imposed as part of the defendant's sentence, from civil forfeiture which may be pursued as an action against the property *in rem* without regard to who the

owner may be.) The other tenet of current law is that if a third party has notice of the forfeiture but fails to file a timely claim, his or her interests are extinguished, and may not be recognized when the court enters the final order of forfeiture. *See 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 21 U.S.C. § 853(n)(7) and can market the property notwithstanding third party's name on the deed). In the rare event that a third party claims that he or she was not afforded adequate notice of a criminal forfeiture action, the person may file a motion under Rule 60(b) of the Federal Rules of Civil Procedure to reopen the ancillary proceeding. *See United States v. Bouler*, 927 F. Supp. 911 (W.D.N.C. 1996) (Rule 60(b) is the proper means by which a third party may move to reopen an ancillary proceeding).

If no third parties assert their interests in the ancillary proceeding, the court must nonetheless determine that the defendant, or combination of defendants) had an interest in the property. Criminal defendants may be jointly and severally liable for the forfeiture of the entire proceeds of the criminal offense. *See United States v. Hurley*, 63 F.3d 1 (1st Cir. 1995) (government can collect the proceeds only once, but subject to that cap, it can collect from any defendant so much of the proceeds as was foreseeable to that defendant); *United States v. Cleveland*, 1997 WL 602186 (E.D. La. Sept. 29, 1997) (same); *United States v. McCarroll*, 1996 WL 355371 at *9 (N.D. Ill. June 19, 1996) (following *Hurley*), *aff'd sub nom. United States v. Jarrett*, 133 F.3d 519 (7th Cir. 1998); *United States v. DeFries*, 909 F. Supp. 13, 19-20 (D.D.C. 1995) (defendants are jointly and severally liable even where government is able to determine precisely how much each defendant benefited from the scheme), *rev'd on other grounds*, 129 F.3d 1293 (D.C. Cir. 1997). Therefore, the conviction of any of the defendants is sufficient to

support the forfeiture of the entire proceeds of the offense, even if the defendants have divided the money among themselves.

As noted in (c)(4), 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.

Subdivision (d). Subdivision (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. Subdivision (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 appellate court considers the appeal. 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, subdivision (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 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.

Subdivision (e). Subdivision (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 (1st Cir. 1995) (court retains authority to order forfeiture of substitute assets after appeal is filed); *United States v. Voigt*, 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).

Subdivision (e)(1) makes clear that the right to a bifurcated jury trial to determine whether the government has established the requisite nexus between the property and the offense, *see* (b)(4), does not apply to the forfeiture of substitute assets or to the addition of newly-discovered property to an existing order of forfeiture. It is well established in the case law that the forfeiture of substitute assets is solely an issue for the court. *See United States v. Hurley*, 63 F.3d 1 (1st Cir. 1995) (court retains authority to order forfeiture of substitute assets after appeal is filed); *United States v. Voigt*, 89 F.3d 1050 (3d Cir. 1996) (following *Hurley*; court may amend order of forfeiture at any time in include substitute assets); *United States v. Thompson*, 837 F. Supp. 585 (S.D.N.Y. 1993) (court, not jury, orders forfeiture of substitute assets). As a practical matter, courts have also determined that they, not the jury, must determine the forfeitability of assets discovered after the trial is over and the jury has been dismissed. *See United States v. Saccoccia*, 898 F. Supp. 53 (D.R.I. 1995) (government may conduct post-trial discovery to determine location and identity of forfeitable assets; post-trial discovery resulted in discovery of gold bars buried in defendant's mother's backyard

several years after the entry of an order directing the defendant to forfeit all property, up to $137 million, involved in his money laundering offense).

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.

REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON PROPOSED AMENDMENTS TO FEDERAL RULES GOVERNING THE GRAND JURY

March 1999

Submitted to the Committees on Appropriations
in accordance with
H. R. Conf. Rep. No. 825, 105 Cong. 2d Sess. 1071 (1998).

REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON PROPOSED AMENDMENTS TO FEDERAL RULES GOVERNING GRAND JURY

March 1999

INTRODUCTION

This report is transmitted in accordance with H. R. Conf. Rep. No. 825, 105 Cong. 2d Sess. 1071 (1998), to the Committees on Appropriations of the Congress. The congressional report "directs the Judicial Conference to report their findings [on whether Rule 6(d) of the Federal Rules of Criminal Procedure should be amended to allow a witness appearing before a grand jury to have counsel present] not later than April 15, 1999."

After an expedited study, the Judicial Conference recommends that no action be taken at this time to amend Criminal Rule 6(d) regarding attorney representation at a grand jury.

RULES ENABLING ACT

The conference report accompanying the Omnibus Appropriations Act (Pub. L. No. 105-277) noted that the Advisory Committee on Criminal Rules was studying proposed amendments to Rule 6(d) and was considering the views of several bar organizations and the Department of Justice. The conference report also noted that the advisory committee "will proceed in accordance with established procedure consistent with the Rules Enabling Act."

Under the Rules Enabling Act, proposed amendments to the federal rules are prescribed by the Supreme Court — subject to congressional change or disapproval — only after being subjected to extensive scrutiny by the public, bar, and bench. The rulemaking process is laborious, but the painstaking process ensures a high level of draftmanship that frequently reduces the potential for future satellite litigation over unforeseen consequences or unclear provisions. It also ensures that all persons who may be affected by a rule change have had an opportunity to express their views on it, including the public. The rules committees were unable to follow the Rules Enabling Act rulemaking process regarding the recommendations made in this report, however, because of the time deadlines imposed under the conference report.

EARLIER CONSIDERATION

At the request of the House Judiciary Committee in the early 1970's, the Advisory Committee on Criminal Rules extensively reviewed the grand jury process, including a proposal to permit attorney representation in the grand jury room. In 1975, the committee submitted a comprehensive report to Congress. One of the report's sections explained in detail the reasons for declining to support a change to Rule 6(d). It is attached as Appendix A. In 1980, the Department of Justice submitted to the chairman of the House Judiciary Committee a

memorandum opposing pending legislation that would have allowed attorney representation in the grand jury room. It is attached as Appendix B. The justifications set forth in the judiciary's 1975 report run parallel to the reasons set forth in the Department of Justice memorandum and reflect longstanding policy concerns. The stated reasons for declining to amend Rule 6(d) to allow attorney representation remain valid today and were relied on by the rules committees in this report.

CURRENT CONSIDERATION

In response to the request of the Committee on Appropriations to study proposed amendments to Criminal Rule 6, the chairman of the Advisory Committee on Criminal Rules, United States Circuit Judge W. Eugene Davis, appointed a subcommittee in late October 1998 chaired by Senior United States District Judge David D. Dowd with three additional members, United States District Judge D. Brooks Smith, Darryl W. Jackson, Esq., and Roger A. Pauley, Esq., of the Department of Justice.

The subcommittee submitted its report with one member dissenting to the full Advisory Committee on Criminal Rules on December 23, 1998. The advisory committee adopted the report's recommendations by a vote of 9 to 3. The dissenting members recommended that the committee devote more time to study the issue before taking a position. The Committee on Rules of Practice and Procedure reviewed and approved the report at its January 7-8, 1999 meeting with two dissenting votes.

DISCUSSION

The subcommittee of the Advisory Committee on Criminal Rules reviewed historical records, reports, and papers on legislative proposals similar to the one now under consideration. It also considered: (1) a September 18, 1998 letter from Larry S. Pozner, the President of the National Association of Criminal Defense Lawyers (NACDL), supporting the proposal in reliance on a recent article authored by Gerald B. Lefcourt,[1] (2) a recent report of the Criminal

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[1]The Lefcourt article appearing in Volume 81, Number 5 of the *Judicature* alleges grand jury abuse, with little, if any, empirical support. It calls for sweeping reforms, predicated on the operation of the Office of the Independent Counsel. It calls for the federal prosecutor to refrain from intentionally withholding "clearly exculpatory evidence," to refrain from intentionally using illegally seized evidence to secure an indictment, to allow a target of a grand jury to approach the grand jury foreman in writing to offer information to the grand jury, to require a Miranda-type warning to be administered to all grand jury witnesses, and finally to have counsel present for witnesses.

Justice Section of the American Bar Association,[2] and (3) the April 18, 1980 letter of former Deputy Attorney General Charles Renfrew to Representative Peter Rodino, which was written when legislation authorizing the presence of counsel for a witness summoned before the grand jury was pending before the Congress as well as a nine-page memorandum opposing the legislation accompanying the Renfrew letter. In addition, the subcommittee reviewed a December 22, 1998 letter from James K. Robinson, the Assistant Attorney General in charge of the Criminal Division in which he sets forth the current position of the Justice Department opposing the proposal. (A copy of Robinson's letter is attached as Appendix C.)

The subcommittee recognized that the criminal defense bar favors a rule amendment that allows counsel to accompany a witness into the grand jury room, while the Department of Justice opposes a modification of Rule 6(d). The current rule limits the persons who may be present in the grand jury room in the following language:

> (d) *Who May Be Present.* 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, but no person other than the jurors may be present while the grand jury is deliberating or voting.

Based on the collective experience of its members, the advisory committee determined that a change to Rule 6(d) was both unnecessary and ill-advised. The committee believed that the claimed misconduct of the government attorneys before the grand jury is not so prevalent as to justify a change in the rule. Occasional abuses undoubtedly may occur, but current law and

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[2]The report of the Criminal Section states in part as follows:

1. Expanding on the already-established ABA policy, a witness before the grand jury shall have the right to be accompanied by counsel in his or her appearance before the grand jury. Such counsel shall be allowed to be present in the grand jury room only during the questioning of the witness and shall be allowed to advise the witness. Such counsel shall not be permitted to address the grand jurors or otherwise take part in proceedings before the grand jury. The court shall have the power to remove such counsel from the grand jury room for conduct inconsistent with this principle.

2. A lawyer or lawyers who are associated in practice should not continue multiple representation of clients in a grand jury proceeding if the exercise of the lawyer's independent professional judgment on behalf of one of the clients will be or is likely to be adversely affected by his or her representation of another client. If the court determines that this principle is violated, it may order separate representation of witnesses, giving appropriate weight to an individual's right to counsel of his or her own choosing. (Emphasis added)

Department of Justice practices contain many safeguards, including some of the type sought by the NACDL. For example, grand jury proceedings are recorded, including any statements by the prosecutor. Moreover, the Department's internal rules governing prosecutors — enforceable through administrative discipline — require advising a target or subject of an investigation of his or her rights, and further require that the prosecutor disclose to the grand jury any exculpatory evidence that directly negates guilt. Additionally, the committee believed that three basic reasons advanced in the nine-page memorandum accompanying the Renfrew April 18, 1980 letter outweigh arguments in favor of a change in Rule 6 authorizing lawyers to accompany witnesses into the grand jury room. Summarized, those reasons for not allowing a witness to bring an attorney into the grand jury room are:

1. Loss of spontaneity of testimony.

2. Transformation of the grand jury into an adversary proceeding.[3]

3. Loss of secrecy with resultant chilling effect on witness cooperation with the accompanying problem of multiple representation.[4]

The committee also considered a preliminary survey of state codes, which showed that about 13 of the 23 states that still use the grand jury allow witnesses to be accompanied by counsel into the grand jury room. Most of these statutes impose significant restrictions and controls on counsel. No firm inferences were drawn from the states' experiences, however, because of the fundamental differences in the types of cases presented to grand juries by state prosecutors and federal prosecutors. The committee did note a potentially ancillary issue.

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[3]One member of the advisory committee's subcommittee suggested that the recent appearance of President Clinton before the grand jury, while accompanied by counsel, violated the provisions of Rule 6(d). According to information from the Independent Counsel's Office, however, the trial judge approved the arrangement under which the President was questioned as not constituting a violation. President Clinton was not in the grand jury room with the jurors. Rather, his testimony — arguably in the form of a deposition — was contemporaneously displayed to the grand jury. In that setting President Clinton's counsel were not present with the grand jurors as counsel would be under the proposed change allowing for witnesses to be accompanied by counsel to the grand jury proceeding.

[4]Multiple representation of defendants by the same lawyer is a continuing problem for district court judges. It is addressed by Rule 44(c) of the Federal Rules of Criminal Procedure. The proposal for a witness to be accompanied by counsel into the grand jury room, however, provides no protection for the witness whose lawyer may have the concerns of other potential defendants to protect, a situation recognized by the American Bar Association. *See* footnote 2, *supra*.

Providing an indigent witness summoned to the grand jury with the right to appointment of counsel would raise serious budgetary concerns for the judiciary.

CONCLUSIONS

The judiciary's concerns with proposed amendments allowing attorney representation in the grand jury room were well captured in a letter from five judges of the United States Court of Appeals for the Second Circuit to the Chair of the House Judiciary chairman referenced in the Renfrew memorandum:

> In practice, however, admitting counsel to the grand jury room poses the serious risk that the proceedings will be protracted and disrupted, with the court being forced to intervene repeatedly. Experience in criminal trials demonstrate that many lawyers simply would not adhere to the idealistic conception that they would limit themselves to advising their clients in sotto voce. Once in the grand jury room, many counsel, would seek to influence the grand jury, using tactics of the type frequently employed in criminal trials, e.g., lengthy objections to questions, in which counsel refers to irrelevant prejudicial material as the basis for an objection. Advice to a witness could be given in tones that would be overheard by every grand juror. A witness' answers would be those of the attorney rather than of the witness himself. Judges would inevitably be invoked to rule on preliminary objections as to the relevancy and materiality of questions to discipline or remove counsel from the grand jury room and to substitute new counsel. Moreover, should a judge discipline or remove a witness' counsel, a serious question would then arise as to whether he had interfered with the witness' constitutional or statutory right to counsel of his own choice.

For the above reasons, the Committee on Rules of Practice and Procedure agreed with the recommendation of the Advisory Committee on Criminal Rules that Criminal Rule 6(d) not be amended at this time.

RECOMMENDATION

The Judicial Conference concurs in the views of the Committee on Rules of Practice and Procedure and recommends that Rule 6(d) of the Federal Rules of Criminal Procedure not be amended to permit attorneys to accompany witnesses into the grand jury room.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
SUPREME COURT BUILDING
WASHINGTON, D. C. 20543

December 8, 1975

TO THE ADVISORY COMMITTEE ON CRIMINAL RULES

Enclosed is a copy of the Grand Jury Report which has been submitted to the House Judiciary Committee.

Sincerely,

William E. Foley
Secretary

cc: Honorable Alfonso J. Zirpoli
Honorable Alexander Harvey II
Honorable Roszel C. Thomsen
Professor Frank J. Remington

REPORT OF THE ADVISORY COMMITTEE
ON CRIMINAL RULES
CONCERNING
THE FEDERAL GRAND JURY

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(5th Cir. 1972); United States v. Kreps, 349 F.Supp. 1049 (W.D.Wis. 1972). (b) The cases reflect the fact that it is now common for prosecutors to give such a warning, particularly when the witness might be viewed as a potential defendant. See, e.g., United States v. Mingola, 424 F.2d 710 (2d Cir. 1970); United States v. Capaldo, 402 F.2d 821 (2d Cir. 1968); United States v. Irwin, 354 F.2d 192 (2d Cir. 1965); United States v. Winter, 348 F.2d 204 (2d Cir. 1965). (c) Consideration of the issue by the Supreme Court is pending. Certiorari was granted on March 24, 1975, in United States v. Mandujano, 496 F.2d 1050 (5th Cir. 1974). Thus, the Committee does not favor the proposals in H. R. 1277, H.R. 2986, H.R. 6006 and H.R. 6207 which would require warning, on a broader basis, of the privilege against self-incrimination and related matters.

(4) Right to Counsel of Grand Jury Witness. It is often said that there is no right to counsel for witnesses called to appear before a federal grand jury, see, e.g., 1967 Duke L.J. 97, 122 (1967) (collecting cases). However, the recent cases reflect the fact that the practice has developed of permitting a grand jury witness to leave the grand jury room in order to consult with his attorney. See, e.g., In re Tierney, 465 F.2d 806 (5th Cir. 1972); United States v. Daniels, 461 F.2d 1076 (5th Cir. 1972); United States v. Weinberg, 439 F.2d 743 (9th Cir. 1971);

United States v. Isaacs, 347 F.Supp. 743 (N.D. Ill. 1972). being the case, a rule or statute on that point is not deemed necessary.

It is well-settled that a witness before a federal grand jury is not entitled to have an attorney accompany him into the grand jury room, United States v. Fitch, 472 F.2d 548 (9th Cir. 1973). See also In re Groban, 352 U.S. 330, 77 S.Ct. 510, 1 L.Ed.2d 376 (1957), where the Court, in deciding that a witness had no right to counsel during interrogation by a state fire marshal, noted that a "witness before a grand jury cannot insist, as a matter of constitutional right, in being represented by his counsel"; Black, J., dissenting, agreed as to the grand jury, noting it "would be very difficult for officers of the state seriously to abuse or deceive a witness in the presence of t grand jury."

The Committee does not favor a rule or statute which would invest a witness before the grand jury with a right to the presence of counsel in the jury room, and thus is not in agreement with the proposals to grant such a right in H.R. 1277, H.R. 2896, H.R. 6006 and H.R. 6207.

Grand jury proceedings are not adversary proceedings as to a potential defendant and certainly not as to the ordinar witness, and they should not become so. The problems of a

witness before a grand jury who is willing to do what the law obliges him to do, i.e., tell the whole truth, are relatively few. The witness does have a legitimate interest in the proper exercise of such privileges as the law may afford him, but in the opinion of the Committee he does not need a lawyer at his elbow in the grand jury room adequately to protect those privileges.

Grand jury proceedings are in the main conducted in the absence of a judge. Whether counsel before the grand jury represents the witness as provided in H.R. 6006 or merely advises him as provided in H.R. 1277, in the absence of a judge exercising immediate control, there is no way in which improper objections stated as such or by way of advise or unwarranted directions not to answer can be ruled upon with any dispatch. Deliberate obstruction would be most difficult to control.

A right to the presence of counsel for a witness before the grand jury carries with it a potential for an important breach of grand jury secrecy. "This problem could become particularly acute in an investigation directed toward an organized criminalgroup where each witness might appear before the grand jury with the same lawyer." Enker and Elsen, Counsel for the Suspect: Messiah v. United States and Escobedo v. Illinois, 49 Minn.L.Rev. 47, 74 n.84 (1964).

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A right to the presence of counsel for a witness before the grand jury carries with it a potential for an important breach of grand jury secrecy. "This problem could become particularly acute in an investigation directed toward an organized criminal group where each witness might appear before the grand jury with the same lawyer." Enker and Elsen, Counsel for the Suspect: Messiah v. United States and Escobedo v. Illinois, 49 Minn.L.Rev. 47, 74 n.84 (1964).

The arguments to the contrary, i.e., the attorney can better protect the witness if he hears the flow of the testimony; the proceedings will be more efficient if the witness does not have to make repeated trips out of the room to consult with counsel; and the secrecy of the proceedings is not impaired by the presence of counsel because the witness may disclose everything to his counsel anyway, are not without merit. See Model Code of Pre-Arraignment Procedure § 340.3, Comment (Proposed Official Draft, 1975); Meshbesher, Right to Counsel Before Grand Jury, 41 F.R.D. 189 (1966). The Committee, however, believes that the additional protections sought to be afforded to the witnesses are not necessary and that new rights should not be created at the risk of impairing the functioning of the grand jury.

(5) Requiring Showing of Grounds to Call a Witness. It has been alleged that there is a growing practice of subpoenaing witnesses without grounds to believe that those witnesses may be in a position to give information relating to the subject of the inquiry. See Donner and Cerruti, The Grand Jury Network, The Nation, Jan. 3, 1972. This has given rise to the suggestion that some minimal requirements be imposed upon the grand jury subpoena power, as by requiring some showing to a court before subpoenas are issued. Comment, 7 Harv. Civ. Rights-Civ. Lib.L. Rev. 432 (1972).

WASHINGTON, D.C. 20530

CBR:PBH:RAP:cdh
Typed 4/18/80

Honorable Peter W. Rodino, Jr.
Chairman, Comittee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I am writing to express the most serious concerns of the Department of Justice with respect to section 7312 of H.R. 6915, the Criminal Code Revision Act of 1980. This section, reversing two hundred years of federal law and practice, would permit a witness before a federal grand jury to be accompanied by counsel. As you know, Rule 6(d) of the Federal Rules of Criminal Procedure reflects the prevailing law and tradition in the federal criminal justice system that a witness may not bring counsel with him into the grand jury room, although the witness may leave the room without prejudice from time to time to consult with counsel during his testimony.

It is my firmly held personal view, as well as the position of the Administration, that this Rule is necessary to preserve the grand jury as an effective investigatory institution. The grand jury is the single most important tool available to the federal government to ferret out complex white collar and organized criminal activities and to bring the perpetrators to justice. For the reasons summarized in the attached memorandum, the fundamental change in grand jury practice proposed in section 7312 is unwise and would have consequences so harmful to federal law enforcement, all of whose felony cases must be begun by grand jury indictment, as to outweigh the benefits that might flow from enactment of a substantive revision of the Federal Criminal Code. Because of the chilling effect such a proposal would have on witness cooperation -- a problem aggravated by the common practice of multiple representation of witnesses by counsel in organized crime, white collar crime, and civil rights investigations -- the practical impact of the proposed change on the government's ability successfully to investigate such priority offenses would be devastating. The various adverse effects of the proposal are discussed in a recent law review article by former United States Attorney Earl Silbert, Defense Counsel in the Grand Jury -The Answer to the White Collar Criminal's Prayers, 15 Amer. Cr. L. Rev. 293 (1978).

Records
Pauley
McNemar
Files 2313
Heymann
Dep. AG
Hold

In addition, putting to one side the merits, we are disturbed by the process by which this section was adopted. The proposal was included without the benefit of hearings and with little debate at the final stage of the Subcommittee's consideration of the bill. The absence of recent hearings on this highly controversial proposal is particularly unfortunate. Since the date of previous Judiciary Committee hearings on the question in 1977, the law relating to grand jury procedure, as well as Department of Justice practices, has substantially changed. The amendment to Rule 6(e) of the Federal Rules of Criminal Procedure in 1979, requiring for the first time that all statements by prosecutors before the grand jury be recorded and available for review by the court provides a new and highly significant deterrent to misconduct. The adoption in 1977 of important additions to the United States Attorneys' Manual, requiring the giving of appropriate warnings to and the conferral of other procedural protections upon grand jury witnesses beyond those mandated by law also greatly changes the context for consideration of the issue. I am unaware of any alleged, much less demonstrated, grand jury improprieties subsequent to those events. In short, whatever may once have been thought by some to be the need for the proposal embodied in section 7312, that need has now been considerably diminished or eliminated. We deserve an opportunity to discuss these changes in the course of deliberate Congressional consideration of any such drastic modification of the processes of law enforcement.

Sincerely,

Charles B. Renfrew

There are many reasons why the superficially appealing concept of permitting a witness to be accompanied by counsel before the grand jury would be unwise. In summary, they are as follows:

1. Loss of spontaneity of testimony. The sole purpose in calling a witness before the grand jury is to elicit from him whatever facts he knows that may be pertinent to the grand jury's investigation. If a witness had counsel at his side and was permitted to consult him before answering questions, the fact finding process would be severely impaired because of the tendency for the witness to become dependent upon, and to repeat or parrot responses discussed with the lawyer, rather than to testify fully and frankly in his own words. For similar reasons, witnesses at trial are not permitted to consult with counsel before responding to questions, save in rare instances.[1]

2. Transformation of grand jury into an adversary proceeding. The fundamental change proposed would transform the federal grand jury process into a proceeding of an adversarial nature inconsistent with the function of the grand jury as a charging (rather than a guilt-determining) body. The result of such a proposal would be substantially increased delays, which are ill-affordable in our criminal justice system.

At the core of our deep-seated concern in this respect is our belief that counsel for the witness will act -- inevitably even if not intentionally -- in a manner that will disrupt and delay the grand jury's investigation. It is naive to expect

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[1] A witness may be permitted to confer with counsel with regard to whether or not to invoke the Fifth Amendment. The infrequent instances in which such advice is needed as to a grand jury witness are met by the witness's right, without prejudice, to leave the room for a brief period for that purpose.

that counsel for a witness facing a grand jury will fail to do everything in his power to seek to protect his client from questions that he regards as irrelevant, overbroad, or in some way technically defective. While the section attempts to limit counsel's role by precluding him from addressing the grand jurors, counsel could still lodge objections with the prosecutor or as a practical matter speak through the witness. In this way, objections predicated upon various rules of evidence and procedure that have been held inapplicable to grand jury proceedings could be raised. In contrast to a court proceeding or a congressional committee hearing, there would be no official present, such as a judge or committee chairman, to rule authoritatively on such objections. To deal with any obstreperous witness would require a break in the proceedings in order to obtain the aid of a court to control the witness under penalty of contempt. We are concerne that the incidence of problems of this kind would mushroom if the long-established prohibition against having counsel present in the grand jury room was abandoned.

We also doubt the practicability of mechanisms for dealing with the problem, e.g., by replacement of counsel, if the proceedings were unduly delayed or impeded. To begin with, the very act of seeking a judicial hearing on the matter would likely consume several days; and it is our belief that courts would be extremely reluctant to order a witness's counsel removed or replaced for a breach of the bill's provisions. There may be, in addition, at least in the case of a witness who has retained his own counsel, a substantial constitutional difficulty in

ordering the witness to obtain other counsel against his wishes.

A number of judges have echoed our concerns about the practical effects of admitting defense counsel into the grand jury. Thus, for example, five judges of the United States Court of Appeals for the Second Circuit, in a memorandum accompanying their letter to the then Chairman of the House Subcommittee considering similar grand jury reform legislation in 1977, observed that:

> In practice, however, admitting counsel to the grand jury room poses the serious risk that the proceedings will be protracted and disrupted, with the court being forced to intervene repeatedly. Experience in criminal trials demonstrates that many lawyers simply would not adhere to the idealistic conception that they would limit themselves to advising their clients in sotto voce. Once in the grand jury room, many counsel, unimpeded by the presence of the court, would seek to influence the grand jury, using tactics of the type frequently employed in criminal trials, e.g., lengthy objections to questions, in which counsel refers to irrelevant prejudicial material as the basis for an objection. Advice to a witness could be given in tones that would be overheard by every grand juror. A witness' answers would be those of the attorney rather than of the witness himself. Judges would inevitably be invoked to rule on preliminary objections as to the relevancy and materiality of questions to discipline or remove counsel from the grand jury room and to substitute new counsel. Moreover, should a judge discipline or remove a witness' counsel, a serious question would then arise as to whether he had interfered with the witness' constitutional or statutory right to counsel of his own choice.

In short, the delays inevitably occasioned by permitting defense counsel inside the grand jury promise to be lengthy

and to spawn an entire new wave of costly litigation. These effects are inconsistent with the goal adopted by the Congress in the Speedy Trial Act of 1974 of reducing crime and the danger of recidivism by requiring speedy trials. In our view the marginal benefits to witnesses which this proposal might involve are far outweighed by the disadvantages to causing the wheels of the federal criminal justice system to grind even more slowly./

/ As one of the reasons given for favoring a proposal for witness's counsel in the grand jury room a representative on behalf of the ABA Criminal Justice Section appearing before a House Subcommittee in 1977, noted the allegedly problem-free experience of States with the practice. In view of this representation (acknowledged not to be based upon "any large sampling or empirical research"), the Department of Justice recently surveyed the law in all States having similar practices (less than 1/4 of the States).

The survey showed that in nearly all of these States substantial limitations exist with respect to the right of counsel for a witness to be inside the grand jury room. Thus, in at least one of the States, this practice is permitted only with respect to a one-man grand jury. In many of the States, moreover, the law allows counsel for a witness only under special circumstances such as when the witness is a target of the investigation, has waived his privilege against self-incrimination, or has received statutory immunity. In a number of the States in which the practice exists the grand jury is not commonly used; rather the prosecutor institutes criminal charges by information. In sum, the experience of the States is no predicate for concluding that the practice could be successfully adopted by the federal criminal justice system, which under the Constitution relies on the grand jury as the exclusive method for investigation and charging of all felonies.

3. Loss of secrecy with resultant chilling effect on witness cooperation in white collar crime cases; the problem of multiple representation. Beyond the problems of interruption and delay that would be caused by letting counsel for witnesses into the grand jury room, a further important concern arising from this proposal relates to impairment of the secrecy of grand jury proceedings, which exists in large part for the benefit of the witnesses themselves. Not infrequently, particularly in investigations of organized crime, business frauds, antitrust violations, and other "white collar" offenses, one attorney represents several potential witnesses. At times counsel is retained, by the very business, union, or other organization whose activities are under investigation, to represent all persons connected with the group. In such situations, the individual witness may possess relevant information and will be willing to cooperate with the investigation. Understandably, however, he may desire that his cooperation not become known to his employer, fellow union members, or others whom he knows his attorney represents or with whom the attorney has been associated. The problem should not be under-estimated. Several years ago, the Special Watergate Prosecutor, in his report to the Congress, noted that multiple legal representation -- several witnesses being represented by one attorney affiliated with an organization -- operated "in many cases" to preclude a witness from "giving adequate consideration to the possibility of cooperating with the Government." Report, Watergate Special Prosecution Force, p. 140. This view has also been expressed

by other commentators, and is one of the reasons why one knowledgeable prosecutor, the former United States Attorney for the District of Columbia, aptly characterized the proposal for defense counsel in the grand jury room as "The Answer to the White Collar Criminal's Prayers." See Silbert, Defense Counsel in the Grand Jury -- The Answer to the White Collar Criminal's Prayers, 15 Amer. Cr.L. Rev. 293, 296-300 (1978); see also Alan Y. Cole, Time For a Change: Multiple Representation Should Be Stopped (1976), an article distributed by Mr. Cole as Chairman to the members of the ABA Criminal Justice Section.

In our view, this problem has become so acute that congressional action thereon is necessary to deal with it. Absent such a solution being adopted, the point to be made with respect to section 7312 is that the problems of witnesses inclined to cooperate who have counsel representing other witnesses before the grand jury or representing the organization whose activities are under investigation would be exacerbated considerably if counsel were allowed to accompany the witness into the grand jury roo

Under the present system, in which counsel remains outside the grand jury room, the witness, while able to disclose as much of his testimony as he chooses, retains the important right to shield the extent of his cooperation or the fact that he was required to supply evidence against others. Were the practice changed to admit counsel to the grand jury room, the witness in such a situation would almost certainly feel less free to cooperate through his testimony. As a practical matter, he could not bar his attorney from the grand jury room without his action being given the worst possible interpretation by those who might wish that the investigation be thwarted. The consequences of shutting off this source of information in organized crime and corporate investigations would be devastating.

4. Prejudice to Indigent or Ordinary Witnesses. The proposal to permit counsel for any grand jury witness into the grand jury room will have as its greatest beneficiaries those persons most closely associated with the most serious and most profitable criminal violations, who will have counsel provided by their confederates or who can afford their own. But the vast bulk of honest Americans will not undergo the expense of counsel simply to be a fact witness before the grand jury, and persons who cannot afford counsel will similarly be disadvantaged (there are many reasons, also, why a proposal for appointed counsel for indigents would not operate effectively in the grand jury context)

6. Lack of Need for the proposal and change in law since last the Committee held hearings to consider the issue. Finally, we point out that there is a lack of demonstrated need for the proposal at this time. While any institution operated by human beings may occasionally produce abuses, and certainly any abuse is regrettable, the federal grand jury system over the years has functioned, and is now functioning, remarkably well. The instances of alleged (much less demonstrated) abuses have been few, given the fact that federal grand juries hear tens of thousands of matters each year, and that the conviction ratio on indictments returned is high (approximately 80%). Moreover, since this Committee last held hearings on this question in 1977, the law has changed to provide a further important safeguard against potential overreaching by prosecutors. On August 1, 1979, Rule 6 of the Federal Rules of Criminal Procedure was amended to mandate the recording of all matters occurring before the grand jury (other than its deliberations), including not only the examination of any witness, but the making of any remarks by the prosecutor. The existence of such recordings (theretofore required in only a few districts), coupled with the opportunity for subsequent review by the court, operates as a significant deterrent to prosecutorial improprieties. Moreover, the Department of Justice has substantially improved its grand jury practices, by promulgating in late 1977 a series of provisions in the United States Attorneys' Manual requiring

federal porseuctors to accord to grand jury witnessses warnings and other procedural benefits well beyond those mandated by law. We are unaware of any alleged pattern of abuse since these improvements were instituted. Thus, whatever may have been the situation in thr past, the case today for so fundamental a change in grand practice as to allow defense counsel inside the grand jury room is particularly weak.

U.S. Department of Justice

Criminal Division

Assistant Attorney General

Washington, DC 20530-0001

December 22, 1998

Honorable David D. Dowd, Jr.
United States Senior District Judge
510 U.S. Courthouse & Federal Building
Two South Main Street
Akron, Ohio 44308

Dear Judge Dowd:

This is in response to your request for the views of the Department of Justice on whether the law should be changed to authorize an attorney to accompany a witness inside a federal grand jury. The Department opposes the proposal.

As you know, the issue of defense counsel in the grand jury has been debated for some time, and was most recently rejected by the Senate earlier this year. The proposal, while superficially appealing, has many problems and has been consistently opposed by the Judicial Conference of the United States as well as by the Department of Justice under Administrations of both political parties.

One major concern is that, if defense counsel were allowed inside the grand jury, the witness' answers would no longer be spontaneous but rather would reflect the lawyer's advice, which could detract from the grand jury's mission to uncover the truth. Likewise, even if counsel's role were ostensibly limited to advising his or her client, the lawyer could disrupt the grand jury proceeding by speaking in audible tones to make known objections to the question or taking other actions to delay the proceeding. Unlike a trial, there is no presiding judicial officer at a grand jury proceeding and thus no effective mechanism to curb such abuses.

Another concern is that providing for witness counsel inside the grand jury room would enhance the opportunity for compromising grand jury secrecy. In addition, allowing defense counsel to accompany a witness before a grand jury would have adverse consequences for investigations of serious crimes by organizations, such as organized crime groups, corporations, or unions where typically a single lawyer represents all or several members of the organization. Currently, if a member of the organization wishes to cooperate with the grand jury investigation secretly, the member may do so by appearing alone before the grand jury. But if the law allowed the member to bring the attorney, failure to do so would be a tip-off that the witness was likely cooperating, which would deter cooperation in many instances (or result in retaliation). Finally, the proposal would either be unfair, in that only those witnesses who could afford counsel could avail themselves of the right, or it would require substantial new expenditures through having to pay for appointed counsel for indigent grand jury witnesses.

Thank you for bringing this matter to my attention and permitting me to explain and clarify the position of the Department.

Sincerely,

James K. Robinson