

Preliminary Draft of
Proposed Amendments to the
Federal Rules of
Bankruptcy and Criminal Procedure

Request for Comment

ALL WRITTEN COMMENTS DUE BY FEBRUARY 15, 1998

AMENDMENTS ARE BEING PROPOSED TO:

Bankruptcy Rules	1017, 1019, 2002, 2003, 3020, 3021, 4001, 4004, 4007, 6004, 6006, 7001, 7004, 7062, 9006, and 9014
Criminal Rules	6, 11, 24, 30, 54, and new Rule 32.2

PUBLIC HEARINGS WILL BE HELD ON THE AMENDMENTS TO:

- Bankruptcy Rules in Washington, D.C. on January 30, 1998; and
- Criminal Rules in New Orleans, Louisiana on December 12, 1997

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF
THE JUDICIAL CONFERENCE OF THE UNITED STATES

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF
THE JUDICIAL CONFERENCE OF THE UNITED STATES

Address all communications on rules to
Secretary of the Committee of Rules of Practice and Procedure
Administrative Office of U.S. Courts
Washington, D.C. 20544

August 1997

**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES**

August 1997

TO THE BENCH, BAR, AND PUBLIC:

The Judicial Conference Advisory Committees on the Bankruptcy and Criminal Rules have proposed amendments to the federal rules and requested that the proposals be circulated to the bench, bar, and public for comment. The advisory committee notes explain the proposals.

We request that all suggestions and comments, whether favorable, adverse, or otherwise, be placed in the hands of the Secretary as soon as convenient and, in any event, **no later than February 15, 1998**. All communications on rules should be addressed to the Secretary of the Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington, D.C. 20544.

To provide persons and organizations wishing an opportunity to comment orally on the proposed amendments, a hearing is scheduled to be held on the amendments to the Bankruptcy Rules in Washington, D.C. on January 30, 1998; and to the Criminal Rules in New Orleans, on December 12, 1997.

Those wishing to testify should contact the Secretary of the Committee at the above address **at least 30 days before the hearing**. The advisory committees will review all timely received comments and will take a fresh look at the proposals in light of the comments. If an advisory committee approves a proposal, it and any revisions as well as a summary of all comments received from the public will then be considered by the Standing Committee. All comments are made part of the official record and are available for public inspection.

The Judicial Conference Standing Committee on Rules of Practice and Procedure **has not approved these proposals**, except to authorize their publication for comment. The proposed amendments have not been submitted to or considered by the Judicial Conference of the United States or the Supreme Court.

Alicemarie H. Stotler
Chair

Peter G. McCabe
Secretary

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**PRELIMINARY DRAFT OF PROPOSED AMENDMENTS
TO THE
FEDERAL RULES OF BANKRUPTCY PROCEDURE**

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

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EVIDENCE RULES

TO: Honorable Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice
and Procedure

FROM: Honorable Adrian G. Duplantier, Chair
Advisory Committee on Bankruptcy Rules

DATE: May 12, 1997

RE: Report of the Advisory Committee on Bankruptcy Rules

Introduction

The Advisory Committee on Bankruptcy Rules met on March 13-14, 1997, in Charleston, South Carolina.

* * * * *

I. Action Items

* * * * *

B. Preliminary Draft of Proposed Amendments to Bankruptcy Rules 1017, 1019, 2002, 2003, 3020, 3021, 4001, 4004, 4007, 6004, 6006, 7001, 7004, 7062, 9006, and 9014 Submitted for Approval to Publish.

1. *Synopsis of Proposed Amendments:*

(a) Rule 1017 is amended to specify the parties entitled to notice of a United States trustee's motion to dismiss a voluntary chapter 7 or chapter 13 case based on the debtor's failure to file a list of creditors, schedules, and statement of financial affairs. Currently, all creditors are entitled to notice of a hearing on the motion if it is a chapter 7 case. To avoid the expense of sending notice to all creditors, the proposed amendments provide that the debtor, the trustee, and any other entities specified by the court, are the only parties entitled to notice. The rule is amended further to provide that a motion to suspend all proceedings in a case or to dismiss a case for substantial abuse of chapter 7 is governed by Rule 9014. Other amendments are stylistic or designed to

delete redundant provisions that are covered by other rules.

(b) Rule 1019 is amended (1) to clarify that a motion for an extension of time to file a statement of intention regarding collateral must be filed or made orally before the time expires; (2) to provide that the holder of a postpetition, preconversion administrative expense claim is required to file a request for payment under § 503(a) of the Code, rather than a proof of claim; and (3) to conform the rule to the 1994 amendment to § 502(b)(9) and to the 1996 amendment to Rule 3002(c)(1) regarding the 180-day period for filing a claim of a governmental unit. Other amendments are stylistic.

(c) Rule 2002(a)(4) is amended to delete the requirement that notice of a hearing on dismissal of a chapter 7 case based on the debtor's failure to file required lists, schedules, and statements, must be sent to all creditors. This amendment conforms to the proposed amendments to Rule 1017 which requires that the notice be sent only to certain parties. This subdivision is amended further to delete the requirement that notice of a hearing on dismissal of the case based on the debtor's failure to pay the filing fee must be sent to all creditors. Rule 2002(f) is amended to provide for notice of the suspension of proceedings under § 305 of the Code.

(d) Rule 2003(d) is amended to require the United States trustee to mail a copy of the report of a disputed election for a chapter 7 trustee to any party in interest that has requested a copy of it. Also, the amended gives a party in interest ten days from the filing of the report, rather than from the date of the meeting of creditors, to file a motion to resolve the dispute. These amendments and other stylistic revisions are designed to conform to proposed amendments to Rule 2007.1(b)(3) on the election of a trustee in a chapter 11 case.

(e) Rule 3020(e) is added to automatically stay for ten days an order confirming a chapter 9 or chapter 11 plan so that parties will have sufficient time to request a stay pending appeal.

(f) Rule 3021 is amended to conform to the amendments to Rule 3020 regarding the ten-day stay of an order confirming a plan in a chapter 9 or chapter 11 case. The other amendments are stylistic.

(g) Rule 4001(a)(3) is added to automatically stay for ten days an order granting relief from an automatic

stay so that parties will have sufficient time to request a stay pending appeal.

(h) Rule 4004(a) is amended to clarify that the deadline for filing a complaint objecting to discharge under § 727(a) is 60 days after the first date set for the meeting of creditors, whether or not the meeting is held on that date. Rule 4004(b) is amended to clarify that a motion for an extension of time for filing a complaint objecting to discharge must be filed before the time has expired. Other amendments are stylistic.

(i) Rule 4007 is amended to clarify that the deadline for filing a complaint to determine dischargeability of a debt under § 523(c) of the Code is 60 days after the first date set for the meeting of creditors, whether or not the meeting is held on that date. This rule is amended further to clarify that a motion for an extension of time for filing a complaint must be filed before the time has expired. Other amendments are stylistic.

(j) Rule 6004(g) is added to automatically stay for ten days an order authorizing the use, sale, or lease of property, other than cash collateral, so that parties will have sufficient time to request a stay pending appeal.

(k) Rule 6006(d) is added to automatically stay for ten days an order authorizing the trustee to assign an executory contract or unexpired lease under § 365(f) so that parties will have sufficient time to request a stay pending appeal.

(l) Rule 7001 is amended to recognize that an adversary proceeding is not necessary to obtain injunctive or other equitable relief when the relief is provided for in a chapter 9, chapter 11, chapter 12, or chapter 13 plan. Other amendments are stylistic.

(m) Rule 7004(e) is amended to provide that the ten-day time limit for service of a summons does not apply if the summons is served in a foreign country.

(n) Rule 7062 is amended to delete the additional exceptions to Rule 62(a) F.R. Civ. P. The deletion of these exceptions—which are orders issued in contested matters rather than adversary proceedings—is consistent with the amendment to Rule 9014 that renders Rule 7062 inapplicable to contested matters. For proposed amendments that provide a new automatic ten-day stay of certain orders, see the amendments to Rules 3020, 3021, 4001, 6004, and 6006.

(o) Rule 9006(c)(2) is amended to prohibit the reduction of time fixed under Rule 1019(6) for filing a request for payment of an administrative expense incurred after the commencement of a case and before conversion of the case to chapter 7.

(p) Rule 9014 is amended to delete Rule 7062 from the list of Part VII rules that automatically apply in a contested matter. Rule 7062, which provides that Rule 62 F.R.Civ.P. is applicable in adversary proceedings, is not appropriate for most orders granting or denying motions governed by Rule 9014. For proposed amendments that provide a new automatic ten-day stay of certain orders to that parties will have sufficient time to obtain a stay pending appeal, see the amendments to Rules 3020, 3021, 4001, 6004, and 6006.

* * * * *

**PROPOSED AMENDMENTS TO THE FEDERAL RULES
OF BANKRUPTCY PROCEDURE***

Rule 1017. Dismissal or Conversion of Case; Suspension

1 (a) VOLUNTARY DISMISSAL; DISMISSAL
2 FOR WANT OF PROSECUTION OR OTHER CAUSE.
3 Except as provided in §§ 707(a)(3), 707(b), 1208(b), and
4 1307(b) of the Code, and in Rule 1017(b), (c), and (e), a case
5 shall not be dismissed on motion of the petitioner, ~~or~~ for want
6 of prosecution or other cause, or by consent of the parties,
7 ~~before~~ prior to a hearing on notice as provided in Rule 2002.
8 For ~~such~~ the purpose of the notice, the debtor shall file a list
9 of ~~all~~ creditors with their addresses within the time fixed by
10 the court unless the list was previously filed. If the debtor
11 fails to file the list, the court may order the debtor or another
12 entity to prepare and file it ~~the preparing and filing by the~~

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

13 ~~debtor or other entity.~~

14 (b) DISMISSAL FOR FAILURE TO PAY
15 FILING FEE.

16 (1) ~~For failure to pay any installment of~~
17 ~~the filing fee, If any installment of the filing fee has~~
18 ~~not been paid, the court may, after a hearing on notice~~
19 ~~to the debtor and the trustee, dismiss the case.~~

20 (2) If the case is dismissed or ~~the case~~
21 closed without full payment of the filing fee, the
22 installments collected shall be distributed in the same
23 manner and proportions as if the filing fee had been
24 paid in full.

25 ~~(3) Notice of dismissal for failure to pay~~
26 ~~the filing fee shall be given within 30 days after the~~
27 ~~dismissal to creditors appearing on the list of creditors~~
28 ~~and to those who have filed claims, in the manner~~

29 ~~provided in Rule 2002.~~

30 ~~(c) DISMISSAL OF VOLUNTARY CHAPTER~~
31 ~~7 OR CHAPTER 13 CASE FOR FAILURE TO TIMELY~~
32 ~~FILE LIST OF CREDITORS, SCHEDULES, AND~~
33 ~~STATEMENT OF FINANCIAL AFFAIRS. The court may~~
34 ~~dismiss a voluntary chapter 7 or chapter 13 case under~~
35 ~~§ 707(a)(3) or § 1307(c)(9) after a hearing on notice served by~~
36 ~~the United States trustee on the debtor, the trustee, and any~~
37 ~~other entities as the court directs.~~

38 ~~(c) (d) SUSPENSION. The court shall not dismiss a~~
39 ~~case or suspend proceedings under § 305 before~~ A case shall
40 ~~not be dismissed or proceedings suspended pursuant to § 305~~
41 ~~of the Code prior to a hearing on notice as provided in Rule~~
42 2002(a).

43 ~~(d) PROCEDURE FOR DISMISSAL OR~~
44 ~~CONVERSION. A proceeding to dismiss a case or convert a~~

45 ~~case to another chapter, except pursuant to §§706(a), 707(b),~~
46 ~~1112(a), 1208(a) or (b), or 1307(a) or (b) of the Code, is~~
47 ~~governed by Rule 9014. Conversion or dismissal pursuant to~~
48 ~~§§706(a), 1112(a), 1208(b), or 1307(b) shall be on motion~~
49 ~~filed and served as required by Rule 9013. A chapter 12 or~~
50 ~~chapter 13 case shall be converted without court order on the~~
51 ~~filing by the debtor of a notice of conversion pursuant to~~
52 ~~§§1208(a) or 1307(a), and the filing date of the notice shall be~~
53 ~~deemed the date of the conversion order for the purposes of~~
54 ~~applying §348(c) of the Code and Rule 1019. The clerk shall~~
55 ~~forthwith transmit to the United States trustee a copy of the~~
56 ~~notice.~~

57 (e) DISMISSAL OF INDIVIDUAL DEBTOR'S
58 CHAPTER 7 CASE FOR SUBSTANTIAL ABUSE. An
59 individual debtor's case may be dismissed for substantial
60 abuse pursuant to under § 707(b) only on motion by the

61 United States trustee or on the court's own motion and after a
62 hearing on notice to the debtor, the trustee, the United States
63 trustee, and ~~such~~ any other ~~parties-in-interest~~ entities as the
64 court directs.

65 (1) A motion by the United States trustee
66 shall be filed ~~not~~ no later than 60 days ~~following~~ after
67 the first date set for the meeting of creditors ~~held~~
68 ~~pursuant to~~ under § 341(a), unless, before such time
69 has expired, the court for cause extends the time for
70 filing the motion. The motion shall ~~advise the debtor~~
71 ~~of~~ set forth all matters to be submitted to the court for
72 its consideration at the hearing.

73 (2) If the hearing is on the court's own
74 motion, notice ~~thereof~~ of the hearing shall be served
75 on the debtor ~~not~~ no later than 60 days ~~following~~ after
76 the first date set for the meeting of creditors ~~pursuant~~

77 to under § 341(a). The notice shall ~~advise the debtor~~
78 of set forth all matters to be considered by the court at
79 the hearing.

80 (f) PROCEDURE FOR DISMISSAL,
81 CONVERSION, OR SUSPENSION.

82 (1) A proceeding to dismiss or suspend a
83 case, or to convert a case to another chapter, except
84 under §§706(a), 1112(a), 1208(a) or (b), or 1307(a) or
85 (b), is governed by Rule 9014.

86 (2) Conversion or dismissal under
87 §§706(a), 1112(a), 1208(b), or 1307(b) shall be on
88 motion filed and served as required by Rule 9013.

89 (3) A chapter 12 or chapter 13 case shall
90 be converted without court order when the debtor files
91 a notice of conversion under §§1208(a) or 1307(a).
92 The filing date of the notice shall be deemed the date

93 of the conversion order for the purposes of applying
94 §348(c) and Rule 1019. The clerk shall forthwith
95 transmit a copy of the notice to the United States
96 trustee.

COMMITTEE NOTE

Subdivision (b)(3), which provides that notice of dismissal for failure to pay the filing fee shall be sent to all creditors within 30 days after the dismissal, is deleted as unnecessary. Rule 2002(f) provides for notice to creditors of the dismissal of a case.

Rule 2002(a) and this rule currently require notice to all creditors of a hearing on dismissal of a voluntary chapter 7 case for the debtor's failure to file a list of creditors, schedules, and statement of financial affairs within the time provided in § 707(a)(3) of the Code. A new subdivision (c) is added to provide that the United States trustee, who is the only entity with standing to file a motion to dismiss under § 707(a)(3) or § 1307(c)(9), is required to serve the motion on only the debtor, the trustee, and any other entities as the court directs. This amendment, and the amendment to Rule 2002, will have the effect of avoiding the expense of sending notices of the motion to all creditors in a chapter 7 case.

New subdivision (f) is the same as current subdivision (d), except that it provides that a motion to suspend all proceedings in a case or to dismiss a case for substantial abuse of chapter 7 under § 707(b) is governed by Rule 9014.

Other amendments to this rule are stylistic or for clarification.

Rule 1019. Conversion of a Chapter 11 Reorganization Case, Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case to a Chapter 7 Liquidation Case

1 When a chapter 11, chapter 12, or chapter 13 case has
2 been converted or reconverted to a chapter 7 case:

3 (1) FILING OF LISTS, INVENTORIES,
4 SCHEDULES, STATEMENTS.

5 * * * * *

6 (B) If a statement of intention is
7 required, it ~~The statement of intention, if~~
8 ~~required,~~ shall be filed within 30 days
9 following after entry of the order of
10 conversion or before the first date set for the
11 meeting of creditors, whichever is earlier. The
12 court may grant an ~~An~~ extension of time may
13 ~~be granted~~ for cause only on written motion

14 filed, or oral request made during a hearing,
15 motion made before the time has expired.
16 Notice of an extension shall be given to the
17 United States trustee and to any committee,
18 trustee, or other party as the court may direct.

19 * * * * *

20 (6) ~~FILING OF~~ POSTPETITION CLAIMS;
21 PRECONVERSION ADMINISTRATIVE
22 EXPENSES; NOTICE. A request for payment of an
23 administrative expense incurred before conversion of
24 the case is timely filed under § 503(a) of the Code if
25 it is filed before conversion or within 90 days after the
26 first date set for the meeting of creditors under § 341
27 called after conversion of the case. If the request is
28 filed by a governmental unit, it is timely if it is filed
29 before conversion or within 180 days after the date of

30 the conversion. A claim of a kind specified in § 348(d)
31 may be filed in accordance with Rules 3001(a)-(d) and
32 3002. On Upon the filing of the schedule of unpaid
33 debts incurred after commencement of the case and
34 before conversion, the clerk, or some other person as
35 the court may direct, shall give notice to those entities
36 listed on the schedule of the time for filing a request
37 for payment of an administrative expense and, unless
38 a notice of insufficient assets to pay a dividend is
39 mailed in accordance with Rule 2002(e), the time for
40 filing a claim of a kind specified in § 348(d), notice to
41 ~~those entities, including the United States, any state,~~
42 ~~or any subdivision thereof, that their claims may be~~
43 ~~filed pursuant to Rules 3001(a)-(d) and 3002. Unless~~
44 ~~a notice of insufficient assets to pay a dividend is~~
45 ~~mailed pursuant to Rule 2002(e), the court shall fix~~

46 ~~the time for filing claims arising from the rejection of~~
47 ~~executory contracts or unexpired leases under~~
48 ~~§§ 348(c) and 365(d) of the Code.~~

49

* * * * *

COMMITTEE NOTE

Paragraph (1)(B) is amended to clarify that a motion for an extension of time to file a statement of intention must be made by written motion filed before the time expires, or by oral request made at a hearing before the time expires.

Subdivision (6) is amended to provide that a holder of an administrative expense claim incurred after the commencement of the case, but before conversion to chapter 7, is required to file a request for payment under § 503(a) within the specified time, rather than a proof of claim under § 501 and Rules 3001(a)-(d) and 3002. The 180-day period applicable to governmental units is intended to conform to § 502(b)(9) of the Code and Rule 3002(c)(1). The time for filing a request for payment of an administrative expense may be enlarged as provided in Rule 9006(b), but may not be reduced. *See* Rule 9006(c)(2). If an administrative expense claimant fails to timely file the request, it may be tardily filed under § 503(a) if permitted by the court for cause.

The final sentence of Rule 1019(6) is deleted because it is unnecessary in view of the other amendments to this paragraph. If a party has entered into a postpetition contract or lease with the trustee or debtor that constitutes an administrative expense, a timely request

for payment must be filed in accordance with this paragraph and § 503(b) of the Code. The time for filing a proof of claim in connection with the rejection of any other executory contract or unexpired lease is governed by Rule 3002(c)(4).

The phrase “including the United States, any state, or any subdivision thereof” is deleted as unnecessary. Other amendments to this rule are stylistic.

Rule 2002. Notices to Creditors, Equity Security Holders, United States, and United States Trustee**

- 1 (a) TWENTY-DAY NOTICES TO PARTIES IN
2 INTEREST. Except as provided in subdivisions (h), (i), and
3 (l) of this rule, the clerk, or some other person as the court
4 may direct, shall give the debtor, the trustee, all creditors and
5 indenture trustees at least 20 days’ notice by mail of:
6 (1) the meeting of creditors under § 341 or
7 § 1104(b) of the Code;

** Includes amendments prescribed by the Supreme Court on April 11, 1997, which take effect on December 1, 1997, unless Congress acts otherwise.

8

* * * * *

9

(4) in a chapter 7 liquidation, a chapter 11

10

reorganization case, ~~or and~~ a chapter 12 family farmer

11

debt adjustment case, the hearing on the dismissal of

12

the case or the conversion of the case to another

13

chapter, unless the hearing is under § 707(a)(3) or

14

§ 707(b) of the Code or is on dismissal of the case for

15

failure to pay the filing fee, or the conversion of the

16

case to another chapter;

17

* * * * *

18

(f) OTHER NOTICES. Except as provided in

19

subdivision (l) of this rule, the clerk, or some other person as

20

the court may direct, shall give the debtor, all creditors, and

21

indenture trustees notice by mail of:

22

* * * * *

23 (2) the dismissal or the conversion of the
24 case to another chapter, or the suspension of
25 proceedings under § 305;

26

* * * * *

COMMITTEE NOTE

Paragraph (a)(4) is amended to conform to the amendments to Rule 1017. If the United States trustee files a motion to dismiss a case for the debtor's failure to file the list of creditors, schedules, or the statement of financial affairs within the time specified in § 707(a)(3), the amendments to this rule and to Rule 1017 eliminate the requirement that all creditors receive notice of the hearing.

Paragraph (a)(4) is amended further to conform to Rule 1017(b), which requires that notice of the hearing on dismissal of a case for failure to pay the filing fee be served on only the debtor and the trustee.

Paragraph (f)(2) is amended to provide for notice of the suspension of proceedings under § 305.

Rule 2003. Meeting of Creditors or Equity Security Holders

1

* * * * *

2 (d) REPORT OF ELECTION AND RESOLUTION
3 OF DISPUTES IN A CHAPTER 7 CASE TO THE COURT.

4 (1) Report of Undisputed Election. In a
5 chapter 7 case, if the election of a trustee or a member
6 of a creditors' committee is not disputed, the United
7 States trustee shall promptly file a report of the
8 election, including the name and address of the person
9 or entity elected and a statement that the election is
10 undisputed.

11 (2) Disputed Election. If the election is
12 disputed, the United States trustee shall promptly file
13 a report stating that the election is disputed, informing
14 the court of the nature of the dispute, and listing the
15 name and address of any candidate elected under any
16 alternative presented by the dispute. No later than the
17 date on which the report is filed, the United States

18 trustee shall mail a copy of the report to any party in
19 interest that has made a request to receive a copy of
20 the report. The presiding officer shall transmit to the
21 court the name and address of any person elected
22 trustee or entity elected a member of a creditors'
23 committee. If an election is disputed, the presiding
24 officer shall promptly inform the court in writing that
25 a dispute exists. Pending disposition by the court of
26 a disputed election for trustee, the interim trustee shall
27 continue in office. If no motion for the resolution of
28 such election dispute is made to the court within 10
29 days after the date of the creditors' meeting, Unless a
30 motion for the resolution of the dispute is filed no
31 later than 10 days after the United States trustee files
32 a report of a disputed election for trustee, the interim
33 trustee shall serve as trustee in the case.

34

* * * * *

COMMITTEE NOTE

Subdivision (d) is amended to require the United States trustee to mail a copy of a report of a disputed election to any party in interest that has requested a copy of it. Also, if the election is for a trustee, the rule as amended will give a party in interest ten days from the filing of the report, rather than from the date of the meeting of creditors, to file a motion to resolve the dispute.

The substitution of “United States trustee” for “presiding officer” is stylistic. Section 341(a) of the Code provides that the United States trustee shall preside at the meeting of creditors. Other amendments are designed to conform to the style of Rule 2007.1(b)(3) regarding the election of a trustee in a chapter 11 case.

Rule 3020. Deposit; Confirmation of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case

1

* * * * *

2

(e) STAY OF CONFIRMATION ORDER. An

3

order confirming a plan is stayed until the expiration of 10

4

days after the entry of the order, unless the court orders

5

otherwise.

COMMITTEE NOTE

Subdivision (e) is added to provide sufficient time for a party to request a stay pending appeal of an order confirming a plan under chapter 9 or chapter 11 of the Code before the plan is implemented and an appeal becomes moot. Unless the court orders otherwise, any transfer of assets, issuance of securities, and cash distributions provided for in the plan may not be made before the expiration of the 10-day period. The stay of the confirmation order under subdivision (e) does not affect the time for filing a notice of appeal from the confirmation order in accordance with Rule 8002.

The court may, in its discretion, order that Rule 3020(e) is not applicable so that the plan may be implemented and distributions may be made immediately. Alternatively, the court may order that the stay under Rule 3020(e) is for a fixed period less than 10 days.

Rule 3021. Distribution Under Plan ***

Except as provided in Rule 3020(e), ~~After confirmation of a plan after a plan is confirmed,~~ distribution shall be made to creditors whose claims have been allowed, to interest holders whose interests have not been disallowed, and to indenture trustees who have filed

*** Includes amendments prescribed by the Supreme Court on April 11, 1997, which take effect on December 1, 1997, unless Congress acts otherwise.

5 claims ~~pursuant to~~ under Rule 3003(c)(5) that have been allowed. For
6 ~~the purpose~~ purposes of this rule, creditors include holders of bonds,
7 debentures, notes, and other debt securities, and interest holders
8 include the holders of stock and other equity securities, of record at
9 the time of commencement of distribution, unless a different time is
10 fixed by the plan or the order confirming the plan.

COMMITTEE NOTE

This amendment is to conform to the amendments to Rule 3020 regarding the ten-day stay of an order confirming a plan in a chapter 9 or chapter 11 case. The other amendments are stylistic.

Rule 4001. Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements

1 (a) RELIEF FROM STAY; PROHIBITING OR
2 CONDITIONING THE USE, SALE, OR LEASE OF PROPERTY.

3 * * * * *

4 (3) STAY OF ORDER. An order granting a
5 motion for relief from an automatic stay made in accordance

6 with Rule 4001(a)(1) is stayed until the expiration of 10 days
7 after the entry of the order, unless the court orders otherwise.

* * * * *

COMMITTEE NOTE

Paragraph (a)(3) is added to provide sufficient time for a party to request a stay pending appeal of an order granting relief from an automatic stay before the order is enforced or implemented. The stay under paragraph (a)(3) is not applicable to orders granted ex parte in accordance with Rule 4001(a)(2).

The stay of the order does not affect the time for filing a notice of appeal in accordance with Rule 8002. While the enforcement and implementation of an order granting relief from the automatic stay is temporarily stayed under paragraph (a)(3), the automatic stay continues to protect the debtor, and the moving party may not foreclose on collateral or take any other steps that would violate the automatic stay.

The court may, in its discretion, order that Rule 4001(a)(3) is not applicable so that the prevailing party may immediately enforce and implement the order granting relief from the automatic stay. Alternatively, the court may order that the stay under Rule 4001(a)(3) is for a fixed period less than 10 days.

Rule 4004. Grant or Denial of Discharge

1 (a) TIME FOR FILING COMPLAINT

2 OBJECTING TO DISCHARGE; NOTICE OF TIME FIXED.

3 In a chapter 7 liquidation case a complaint objecting to the
4 debtor's discharge under § 727(a) of the Code shall be filed
5 ~~not no~~ later than 60 days ~~following~~ after the first date set for
6 the meeting of creditors ~~held pursuant to~~ under § 341(a). In
7 a chapter 11 reorganization case, ~~such~~ the complaint shall be
8 filed ~~not no~~ later than the first date set for the hearing on
9 confirmation. ~~Not less than 25 days~~ At least 25 days' notice
10 of the time so fixed shall be given to the United States trustee
11 and all creditors as provided in Rule 2002(f) and (k), and to
12 the trustee and the trustee's attorney.

13 (b) EXTENSION OF TIME. On motion of any
14 party in interest, after hearing on notice, the court may ~~extend~~
15 for cause extend the time to file ~~for filing~~ a complaint
16 objecting to discharge. The motion shall be ~~made~~ filed before
17 ~~such~~ the time has expired.

COMMITTEE NOTE

Subdivision (a) is amended to clarify that, in a chapter 7 case, the deadline for filing a complaint objecting to discharge under § 727(a) is 60 days after the first date set for the meeting of creditors, whether or not the meeting is held on that date. The time for filing the complaint is not affected by any delay in the commencement or conclusion of the meeting of creditors. This amendment does not affect the right of any party in interest to file a motion for an extension of time to file a complaint objecting to discharge in accordance with Rule 4004(b).

The substitution of the word “filed” for “made” in subdivision (b) is intended to avoid confusion regarding the time when a motion is “made” for the purpose of applying these rules. *See, e.g., In re Coggin*, 30 F.3d 1443 (11th Cir. 1994). As amended, this rule requires that a motion for an extension of time for filing a complaint objecting to discharge be *filed* before the time has expired.

Other amendments to this rule are stylistic.

Rule 4007. Determination of Dischargeability of a Debt

1 (c) TIME FOR FILING COMPLAINT UNDER
 2 § 523(c) IN A CHAPTER 7 LIQUIDATION, CHAPTER 11
 3 REORGANIZATION, OR ~~AND~~ CHAPTER 12 FAMILY

4 FARMER'S DEBT ADJUSTMENT ~~CASES~~ CASE; NOTICE
5 OF TIME FIXED. A complaint to determine the
6 dischargeability of ~~any a~~ debt pursuant to under § 523(c) of
7 ~~the Code~~ shall be filed ~~not no~~ later than 60 days following
8 after the first date set for the meeting of creditors held
9 pursuant to under § 341(a). The court shall give all creditors
10 ~~not no~~ less than 30 ~~days~~ days' notice of the time so fixed in
11 the manner provided in Rule 2002. On motion of ~~any a~~ party
12 in interest, after hearing on notice, the court may for cause
13 extend the time fixed under this subdivision. The motion shall
14 be ~~made~~ filed before the time has expired.

15 (d) TIME FOR FILING COMPLAINT
16 UNDER § 523(c) IN CHAPTER 13 INDIVIDUAL'S DEBT
17 ADJUSTMENT CASES; NOTICE OF TIME FIXED. On
18 motion by a debtor for a discharge under § 1328(b), the court
19 shall enter an order fixing ~~a time for the filing of~~ the time to

20 file a complaint to determine the dischargeability of any debt
21 ~~pursuant to~~ under § 523(c) and shall give ~~not~~ no less than 30
22 ~~days~~ days' notice of the time fixed to all creditors in the
23 manner provided in Rule 2002. On motion of any party in
24 interest, after hearing on notice, the court may for cause
25 extend the time fixed under this subdivision. The motion
26 shall be ~~made~~ filed before the time has expired.

27 * * * * *

COMMITTEE NOTE

Subdivision (c) is amended to clarify that the deadline for filing a complaint to determine the dischargeability of a debt under § 523(c) of the Code is 60 days after the first date set for the meeting of creditors, whether or not the meeting is held on that date. The time for filing the complaint is not affected by any delay in the commencement or conclusion of the meeting of creditors. This amendment does not affect the right of any party in interest to file a motion for an extension of time to file a complaint to determine the dischargeability of a debt in accordance with this rule.

The substitution of the word “filed” for “made” in the final sentences of subdivisions (c) and (d) is intended to avoid confusion regarding the time when a motion is “made” for the purpose of applying these rules. *See, e.g., In re Coggin*, 30 F.3d 1443 (11th Cir.

1994). As amended, these subdivisions require that a motion for an extension of time be *filed* before the time has expired.

The other amendments to this rule are stylistic.

Rule 6004. Use, Sale, or Lease of Property

1

* * * * *

2

(g) STAY OF ORDER AUTHORIZING USE,

3

SALE, OR LEASE OF PROPERTY. An order authorizing

4

the use, sale, or lease of property other than cash collateral is

5

stayed until the expiration of 10 days after entry of the order,

6

unless the court orders otherwise.

COMMITTEE NOTE

Subdivision (g) is added to provide sufficient time for a party to request a stay pending appeal of an order authorizing the use, sale, or lease of property under § 363(b) of the Code before the order is implemented. It does not affect the time for filing a notice of appeal in accordance with Rule 8002.

Rule 6004(g) does not apply to orders regarding the use of cash collateral and does not affect the trustee's right to use, sell, or lease property without a court order to the extent permitted under § 363 of the Code.

The court may, in its discretion, order that Rule 6004(g) is not applicable so that the property may be used, sold, or leased immediately in accordance with the order entered by the court. Alternatively, the court may order that the stay under Rule 6004(g) is for a fixed period less than 10 days.

Rule 6006. Assumption, Rejection and or Assignment of an Executory ~~Contracts~~ and Contract or Unexpired ~~Leases~~ Lease

1

* * * * *

2

(d) STAY OF ORDER AUTHORIZING

3

ASSIGNMENT. An order authorizing the trustee to assign an

4

executory contract or unexpired lease under § 365(f) is stayed

5

until the expiration of 10 days after the entry of the order,

6

unless the court orders otherwise.

COMMITTEE NOTE

Subdivision (d) is added to provide sufficient time for a party to request a stay pending appeal of an order authorizing the assignment of an executory contract or unexpired lease under § 365(f) of the Code before the assignment is consummated. The stay under subdivision (d) does not affect the time for filing a notice of appeal in accordance with Rule 8002.

The court may, in its discretion, order that Rule 6006(d) is not applicable so that the executory contract or unexpired lease may be assigned immediately in accordance with the order entered by the court. Alternatively, the court may order that the stay under Rule 6006(d) is for a fixed period less than 10 days.

Rule 7001. Scope of Rules of Part VII

1 An adversary proceeding is governed by the rules of
2 this Part VII. ~~It is a proceeding~~ Any of the following is an
3 adversary proceeding:

4 (1) a proceeding to recover money or
5 property, ~~except other than~~ a proceeding to compel the
6 debtor to deliver property to the trustee, or a
7 proceeding under § 554(b) or § 725 of the Code, Rule
8 2017, or Rule 6002;

9 (2) a proceeding to determine the validity,
10 priority, or extent of a lien or other interest in
11 property, other than a proceeding under Rule
12 4003(d);

13 (3) a proceeding to obtain approval
14 pursuant to under § 363(h) for the sale of both the
15 interest of the estate and of a co-owner in property;

16 (4) a proceeding to object to or revoke a
17 discharge;

18 (5) a proceeding to revoke an order of
19 confirmation of a chapter 11, chapter 12, or chapter 13
20 plan;

21 (6) a proceeding to determine the
22 dischargeability of a debt;

23 (7) a proceeding to obtain an injunction or
24 other equitable relief, except when a chapter 9,
25 chapter 11, chapter 12, or chapter 13 plan provides for
26 the relief;

27 (8) a proceeding to subordinate any
28 allowed claim or interest, except when a chapter 9,

5 ~~(h)(1), (i), or (j)(2)~~ F.R.Civ.P. it shall be made by delivery of
6 the summons and complaint within 10 days after the
7 summons is issued ~~following issuance of the summons~~. If
8 service is made by any authorized form of mail, the summons
9 and complaint shall be deposited in the mail within 10 days
10 after the summons is issued ~~following issuance of the~~
11 ~~summons~~. If a summons is not timely delivered or mailed,
12 another summons shall be issued and served. This
13 subdivision does not apply to service in a foreign country.

14

* * * * *

COMMITTEE NOTE

Subdivision (e) is amended so that the ten-day time limit for service of a summons does not apply if the summons is served in a foreign country.

Rule 7062. Stay of Proceedings to Enforce a Judgment

1

Rule 62 F.R.Civ.P. applies in adversary proceedings.

2

~~An order granting relief from an automatic stay provided by~~

4 (2) REDUCTION NOT PERMITTED. The court
5 may not reduce the time for taking action pursuant to under
6 Rules 1019(6), 2002(a)(7), 2003(a), 3002(c), 3014, 3015,
7 4001(b)(2), (c)(2), 4003(a), 4004(a), 4007(c), 8002, and
8 9033(b).

9

* * * * *

COMMITTEE NOTE

Subdivision (c)(2) is amended to add a reference to Rule 1019(6), which fixes the time for filing a request for payment of an administrative expense incurred after the commencement of the case but before conversion of the case to chapter 7.

Rule 9014. Contested Matters

1 In a contested matter in a case under the Code not
2 otherwise governed by these rules, relief shall be requested by
3 motion, and reasonable notice and opportunity for hearing
4 shall be afforded the party against whom relief is sought. No
5 response is required under this rule unless the court orders an
6 answer to a motion. The motion shall be served in the

7 manner provided for service of a summons and complaint by
8 Rule 7004, and, unless the court otherwise directs, the
9 following rules shall apply: 7021, 7025, 7026, 7028-7037,
10 7041, 7042, 7052, 7054-7056, ~~7062~~, 7064, 7069, and 7071.
11 The court may at any stage in a particular matter direct that
12 one or more of the other rules in Part VII shall apply. An
13 entity that desires to perpetuate testimony may proceed in the
14 same manner as provided in Rule 7027 for the taking of a
15 deposition before an adversary proceeding. The clerk shall
16 give notice to the parties of the entry of any order directing
17 that additional rules of Part VII are applicable or that certain
18 of the rules of Part VII are not applicable. The notice shall be
19 given within such time as is necessary to afford the parties a
20 reasonable opportunity to comply with the procedures made
21 applicable by the order.

COMMITTEE NOTE

This rule is amended to delete Rule 7062 from the list of Part VII rules that automatically apply in a contested matter.

Rule 7062 provides that Rule 62 F.R.Civ.P., which governs stays of proceedings to enforce a judgment, is applicable in adversary proceedings. The provisions of Rule 62, including the ten-day automatic stay of the enforcement of a judgment provided by Rule 62(a) and the stay as a matter of right by posting a supersedeas bond provided in Rule 62(d), are not appropriate for most orders granting or denying motions governed by Rule 9014.

Although Rule 7062 will not apply automatically in contested matters, the amended rule permits the court, in its discretion, to order that Rule 7062 apply in a particular matter, and Rule 8005 gives the court discretion to issue a stay or any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest. In addition, amendments to Rules 3020, 4001, 6004, and 6006 automatically stay certain types of orders for a period of ten days, unless the court orders otherwise.

PRELIMINARY DRAFT OF PROPOSED AMENDMENTS
TO THE
FEDERAL RULES OF CRIMINAL PROCEDURE

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

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EVIDENCE RULES

TO: Honorable. Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable. D. Lowell Jensen, Chair
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: Report of the Advisory Committee on Criminal Rules

DATE: May 12, 1997

I. Introduction

The Advisory Committee on the Rules of Criminal Procedure met on April 7, 1997 in Washington, D.C. and took action on a number of proposed amendments.

* * * * *

Second, the Committee considered proposed amendments to other rules and recommends that the proposed changes to those rules be published for public comment:

- Rule 6. Grand Jury (Presence of Interpreters; Return of Indictment)
- Rule 11. Pleas (Acceptance of Pleas and Agreements, etc.)
- Rule 24(c). Alternate Jurors (Retention During Deliberations)
- Rule 30. Instructions (Submission of Requests for Instructions)
- Rule 32.2. Forfeiture Procedures
- Rule 54. Application and Exception

* * * * *

III. Action Items--Recommendations to Publish Proposed Amendments for Public Comment

At its April 1997 meeting the Advisory Committee considered proposed amendments to Rule 6 (Grand Jury), Rule 11 (Pleas), Rule 24(c) (Alternate Jurors), Rule 30 (Instructions), and Rule 54 (Application and Exception). As noted in the following discussion, the Committee recommends that these proposed amendments be published for comment by the bench and the bar.

A. Summary and Recommendations

1. ACTION ITEM—Rule 6. The Grand Jury

The Committee has proposed two amendments to Rule 6. The first, in Rule 6(c), would make provision for interpreters for deaf jurors to take part in the deliberations;* under the current rule, no persons other than the jurors themselves may be present. The second amendment would change Rule 6(f) regarding the return of an indictment. Under current practice the entire grand jury is required to return the indictment in open court. The proposed change would permit the grand jury foreperson to return the indictment in open court—on behalf of the grand jury. In drafting the amendment, the Committee incorporated some of the suggested style changes submitted by the Subcommittee on Style; one change, which would have made a substantive change regarding the return of an indictment if a complaint or information was pending, was not accepted.

Recommendation: The Advisory Committee recommends that the proposed amendments to Rule 6 be published for public comment by the bench and bar.

* The Standing Committee on Rules revised the proposed amendments to expand the exception in the rule to allow any interpreter found to be necessary to assist a grand juror to be present during grand jury deliberations. It believed that the limitation as to the kind of interpreter should be removed to provide an opportunity for the widest range of public comment on all issues raised by the presence of an interpreter during deliberations.

2. ACTION ITEM—Rule 11. Pleas

The proposed amendments to Rule 11 reflect the Committee's discussion over the last year concerning the interplay between the sentencing guidelines and plea agreements and the ability of a defendant to waive any attacks on his or her sentence.

Specifically, Rule 11(a) has been changed slightly to conform the definition of organizational defendants and Rule 11(c) would be amended to require the trial court to determine if the defendant understands any provision in the plea agreement waiving the right to appeal or to collaterally attack the sentence.

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

The Committee considered but ultimately decided to defer proposing an amendment which might address the issue raised in *United States v. Hyde*, 82 F.3d 319 (9th Cir. 1996), as amended at 92 F.3d 779 (9th Cir. 1996). In that case, the Court concluded that until the trial court accepts or rejects both the plea and the plea agreement, the plea is not final. In the Committee's view, that holding directly conflicts with the clear language of Rules 11 and 32 concerning acceptance of pleas. The Supreme Court granted certiorari and has heard oral arguments on the case.**

Recommendation: The Advisory Committee recommends that the proposed amendments to Rule 11 be published for public comment by the bench and bar.

** The Supreme Court decided the case on May 27, 1997, reversing the lower court's holding.

3. ACTION ITEM—Rule 24(c). Alternate Jurors

The proposed amendment to Rule 24(c) would permit the trial court to retain alternate jurors—who during the trial have not been selected as substitutes for regular jurors—during the deliberations in case any other regular juror becomes incapacitated and can no longer take part. Although Rule 23 makes provision for returning a verdict with 11 jurors, the Committee believed that the judge should have the discretion in a particular case to retain the alternates, a practice not provided for under the current rule. The proposed amendment also includes changes suggested by the Style Subcommittee.

Recommendation: The Advisory Committee recommends that the proposed amendments to Rule 24(c) be published for public comment by the bench and bar.

4. ACTION ITEM—Rule 30. Instructions.

The proposed amendment to Rule 30 would permit the trial court, in its discretion, to require or permit the parties to file any requests for instructions before trial. When it studied the local rules last year, the Committee noted that a number of courts currently include such a provision in their rules. Instead of adopting a national rule which would require pretrial filing of requests in all cases, the Committee proposes that the matter be left to a court's discretion. The draft includes changes suggested by the Style Subcommittee.

Recommendation: The Advisory Committee recommends that the proposed amendments to Rule 30 be published for public comment by the bench and bar.

5. ACTION ITEM—Rule 32.2. Forfeiture Procedures.

The Committee proposes adoption of a new rule dedicated solely to the question of forfeiture proceedings. Over the last several years the Committee has discussed the jury's role in criminal forfeiture. Under existing rules provisions, once a verdict is returned on any count involving forfeiture of property involved in the crime, the jury is asked to decide

questions of ownership or property interests vis a vis the defendant(s). However, in *Libretti v. United States*, 116 S.Ct. 356 (1995), the Supreme Court indicated that criminal forfeiture constitutes an aspect of the sentence imposed in the case and that the defendant has no constitutional right to have a jury decide any part of the sentence. Accordingly, the Department of Justice recommended a streamlined process which would leave the issue of criminal forfeiture to the court. The Committee finally settled on proposing one new rule. The adoption of this new rule would require the abrogation of Rules 7(c)(2), 31(e), and 32(d)(2). Rule 38(e) would be amended by striking “3554” and striking “Criminal Forfeiture” in the rule’s heading. The draft includes changes suggested by the Style Subcommittee.

Recommendation: The Advisory Committee recommends that the proposed Rule 32.2 be published for public comment by the bench and bar.

6. ACTION ITEM—Rule 54. Application and Exception

The proposed amendment to Rule 54 is a minor change reflecting the fact that the Canal Zone court no longer exists. The Committee considered, but deferred, a proposal from one of the members of the Style Subcommittee to delete the references to the Supreme Court and the Courts of Appeals as being obsolete.

Recommendation: The Advisory Committee recommends that the proposed amendments to Rule 54 be published for public comment by the bench and bar.

* * * * *

PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 6. The Grand Jury

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* * * * *

2

(d) Who May Be Present.

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(1) While Grand Jury is in Session. Attorneys for

4

the government, the witness under examination, interpreters

5

when needed and, for the purpose of taking the evidence, a

6

stenographer or operator of a recording device may be present

7

while the grand jury is in session, ~~and~~

8

(2) During Deliberations and Voting. ~~but no~~ No

9

person other than the jurors, and any interpreter necessary to

10

assist a juror, may be present while the grand jury is

11

deliberating or voting.

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

12

* * * * *

13

(f) FINDING AND RETURN OF INDICTMENT. A grand jury may

14

indict ~~An indictment may be found~~ only upon the concurrence of 12

15

or more jurors. The indictment shall be returned by the grand jury or

16

through the foreperson or deputy foreperson on its behalf, to a federal

17

magistrate judge in open court. If a complaint or information is

18

pending against the defendant and 12 jurors do not vote to indict

19

~~concur in finding an indictment~~, the foreperson shall so report to a

20

federal magistrate judge in writing as soon as possible forthwith.

21

* * * * *

COMMITTEE NOTE

Subdivision 6(d). As currently written, Rule 6(d) absolutely bars any person, other than the jurors themselves, from being present during the jury's deliberations and voting. Accordingly, interpreters are barred from attending the deliberations and voting by the grand jury, even though they may have been present during the taking of testimony. The amendment is intended to permit interpreters to assist persons serving on a grand jury. Although the Committee believes that the need for secrecy of grand jury deliberations and voting is paramount, permitting interpreters in the process seems a reasonable accommodation. *See also United States v. Dempsy*, 830 F.2d 1084

(10th Cir. 1987) (constitutionally rooted prohibition of non-jurors being present during deliberations was not violated by interpreter for deaf petit jury member).

As originally drafted by the Advisory Committee, the provision for interpreters would have been extended only to interpreters for deaf persons serving on a grand jury. The Standing Committee, however, believed that the limitation as to the kind of interpreter permitted to be present during grand jury deliberations should be removed in order to provide an opportunity for the widest range of public comment on all the issues raised by the presence of an interpreter during those deliberations. Thus, the proposed amendment extends to any interpreter who may be necessary to assist a grand juror.

The subdivision has also been restyled and reorganized.

Subdivision 6(f). The amendment to Rule 6(f) is intended to avoid the problems associated with bringing the entire grand jury to the court for the purpose of returning an indictment. Although the practice is long-standing, in *Breese v. United States*, 226 U.S. 1 (1912), the Court rejected the argument that the requirement was rooted in the Constitution and observed that if there were ever any strong reasons for the requirement, they “have disappeared, at least in part.” 226 U.S. at 10. The Court added that grand jury’s presence at the time the indictment was presented was a defect, if at all, in form only. *Id.* at 11. Given the problems of space, in some jurisdictions the grand jury sits in a building completely separated from the courtrooms. In those cases, moving the entire jury to the courtroom for the simple process of presenting the indictment may prove

difficult and time consuming. Even where the jury is in the same location, having all of the jurors present can be unnecessarily cumbersome in light of the fact that filing of the indictment requires a certification as to how the jurors voted.

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

Rule 7. The Indictment and the Information

1

* * * * *

2

(c) NATURE AND CONTENTS.

3

* * * * *

4

(2) *Criminal Forfeiture.* No judgment of

5

forfeiture may be entered in a criminal proceeding unless the

6

indictment or the information ~~shall allege the extent of the~~

7

~~interest or property subject to forfeiture~~ alleges that the

8

defendant has a possessory or legal interest in property that is

9

subject to forfeiture in accordance with the applicable statute.

10

* * * * *

31 acting pro se ~~—~~ may agree ~~engage in discussions with a view~~
32 ~~toward reaching an agreement~~ that, upon the defendant's
33 ~~entering of~~ a plea of guilty or nolo contendere to a charged
34 offense, or to a lesser or related offense, the attorney for the
35 government will ~~do any of the following:~~

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

38 (B) recommend, make a recommendation,
39 or agree not to oppose the defendant's request; for a
40 particular sentence; or sentencing range, or that a
41 particular provision of the Sentencing Guidelines, or
42 policy statement, or sentencing factor is or is not
43 applicable to the case. Any such ~~with the~~
44 ~~understanding that such~~ recommendation or request is
45 ~~shall not be binding on~~ upon the court; or

46 (C) agree that a specific sentence or
47 sentencing range is the appropriate disposition of the
48 case, or that a particular provision of the Sentencing
49 Guidelines, or policy statement, or sentencing factor
50 is or is not applicable to the case. Such a plea
51 agreement is binding on the court once it is accepted
52 by the court.

53 The court shall not participate in any
54 such discussions between the parties concerning any
55 such plea agreement.

56 * * * * *

COMMITTEE NOTE

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

Subdivision (c)(6). Rule 11(c) has been amended specifically to reflect the increasing practice of including provisions in plea agreements which require the defendant to waive certain appellate rights. The increased use of such provisions is due in part to the

increasing number of direct appeals and collateral reviews challenging sentencing decisions. Given the increased use of such provisions, the Committee believed it was important to insure that first, a complete record exists regarding any waiver provisions, and second, that the waiver was voluntarily and knowingly made by the defendant. The amendment provides no specific guidance on the content of the court's advice. That is left to the court's discretion and judgment.

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

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

Rule 24. Trial Jurors

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* * * * *

2

(c) ALTERNATE JURORS.

3

(1) In General. The court may empanel no direct

4

~~that not~~ more than 6 jurors, in addition to the regular jury, ~~be~~

5

~~called and impanelled~~ to sit as alternate jurors. An alternate

6

juror. ~~Alternate jurors in the order in which they are called,~~

7

shall replace a juror ~~jurors who,~~ ~~prior to the time the jury~~

8

~~retires to consider its verdict,~~ becomes or is found ~~become or~~

9

~~are found~~ to be unable or disqualified to perform juror ~~their~~

10

duties. Alternate jurors shall (i) be drawn in the same manner,

11

~~shall~~ (ii) have the same qualifications, ~~shall~~ (iii) be subject to

12

the same examination and challenges, and shall (iv) take the

13

same oath as regular jurors. An alternate juror has and shall

14

~~have~~ the same functions, powers, facilities and privileges as

15

a regular juror. ~~the regular jurors.~~ ~~An alternate juror who~~

16 ~~does not replace a regular juror shall be discharged after the~~
17 ~~jury retires to consider its verdict.~~

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

30 (3) Discharge. When the jury retires to consider
31 the verdict, the court in its discretion may retain the alternate

32 jurors during deliberations. If the court decides to retain the
33 alternate jurors, it shall ensure that they do not discuss the
34 case with any other person unless and until they replace a
35 regular juror during deliberations.

COMMITTEE NOTE

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

Rule 23(b) provides that in some circumstances a verdict may be returned by less than twelve jurors. There may be cases, however, where it is better to retain the alternates when the jury retires, insulate them from the deliberation process, and have them available should one or more vacancies occur in the jury. That might be especially appropriate in a long, costly, and complicated case. To that end the Committee believed that the court should have the discretion to decide whether to retain or discharge the alternates at the time the jury retires to deliberate.

In order to protect the sanctity of the deliberative process, the rule requires the court to take appropriate steps to insulate the alternate jurors. That may be done, for example, by separating the

alternates from the deliberating jurors and instructing the alternate jurors not to discuss the case with any other person until they replace a regular juror. *See, e.g., United States v. Olano*, 507 U.S. 725 (1993) (not plain error to permit alternate jurors to sit in during deliberations); *United States v. Houlihan*, 92 F.3d at 1286-88 (harmless error to retain alternate jurors in violation of Rule 24(c); in finding harmless error the court cited the steps taken by the trial judge to insulate the alternates). If alternates are used, the jurors must be instructed that they must begin their deliberations anew.

Finally, the rule has been reorganized and restyled.

Rule 30. Instructions

1 Any party may request in writing that the court
2 instruct the jury on the law as specified in the request. The
3 request may be made ~~At~~ at the close of the evidence, or at
4 such ~~any~~ earlier time that ~~as~~ the court reasonably directs, ~~any~~
5 ~~party may file written requests that the court instruct the jury~~
6 ~~on the law as set forth in the requests. At the same time, a~~
7 copy of the request shall be furnished to all other parties.
8 ~~copies of such requests shall be furnished to all parties.~~
9 Before closing arguments, ~~The~~ court shall inform counsel

10 of its proposed action on the requests ~~upon the requests prior~~
11 ~~to their arguments to the jury~~. The court may instruct the jury
12 before or after the arguments are completed, or at both times.
13 No party may appeal from ~~assign as error~~ any portion of the
14 charge or from anything omitted, ~~omission therefrom~~ unless
15 that party objects ~~thereto~~ before the jury retires to consider its
16 verdict and states, ~~stating~~ distinctly the matter to which
17 objection is made ~~that party objects~~ and the grounds for ~~of~~ the
18 objection. An opportunity must ~~Opportunity shall~~ be given to
19 object ~~make the objection~~ out of the jury's hearing ~~of the jury~~
20 and, on request ~~of any party~~, out of the jury's presence ~~of the~~
21 jury.

COMMITTEE NOTE

The amendment addresses the timing of requests for instructions. As currently written, the trial court may not direct the parties to file such requests before trial without violating Rules 30 and 57. While the amendment falls short of requiring all requests to be made before trial in all cases, the amendment now permits a court

to do so in a particular case or as a matter of local practice under local rules promulgated under Rule 57.

Rule 31. Verdict

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~~(e) CRIMINAL FORFEITURE. If the indictment or the~~

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~~information alleges that an interest or property is subject to~~

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~~criminal forfeiture, a special verdict shall be returned as to the~~

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~~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.

Rule 32. Sentence and Judgment

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(d) JUDGMENT.

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(2) *Criminal Forfeiture.* Forfeiture procedures are

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governed by Rule 32.2. If a verdict contains a finding that

~~6 property is subject to criminal forfeiture, or if a defendant
7 enters a guilty plea subjecting property to such forfeiture, the
8 court may enter a preliminary order of forfeiture after
9 providing notice to the defendant and a reasonable
10 opportunity to be heard on the timing and form of the order.
11 The order of forfeiture shall authorize the Attorney General to
12 seize the property subject to forfeiture, to conduct any
13 discovery that the court considers proper to help identify,
14 locate, or dispose of the property, and to begin proceedings
15 consistent with any statutory requirements pertaining to
16 ancillary hearings and the rights of third parties. At
17 sentencing, a final order of forfeiture shall be made part of the
18 sentence and included in the judgment. The court may
19 include in the final order such conditions as may be
20 reasonably necessary to preserve the value of the property
21 pending any appeal.~~

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* * * * *

COMMITTEE NOTE

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

32.2. Criminal Forfeiture

- 1 (a) INDICTMENT OR INFORMATION. No judgment of
2 forfeiture may be entered in a criminal proceeding unless the
3 indictment or information alleges that a defendant has a
4 possessory or legal interest in property that is subject to
5 forfeiture in accordance with the applicable statute.
- 6 (b) HEARING AND ENTRY OF PRELIMINARY ORDER OF
7 FORFEITURE. As soon as practicable after entering a guilty
8 verdict or accepting a plea of guilty or nolo contendere on any
9 count in the indictment or information for which criminal
10 forfeiture is alleged, the court shall determine what property
11 is subject to forfeiture because it is related to the offense. The
12 determination may be based on evidence already in the record,

13 including any written plea agreement, or on evidence adduced
14 at a post trial hearing. If the property is subject to forfeiture,
15 the court shall enter a preliminary order directing the
16 forfeiture of whatever interest each defendant may have in the
17 property, without determining what that interest is. Deciding
18 the extent of each defendant's interest is deferred until any
19 third party claiming an interest in the property has petitioned
20 the court to consider the claim. If no such petition is timely
21 filed, and the court finds that a defendant had a possessory or
22 legal interest, the property is forfeited in its entirety.

23 (c) PRELIMINARY ORDER OF FORFEITURE. When the
24 court enters a preliminary order of forfeiture, the Attorney
25 General may seize the property subject to forfeiture; conduct
26 any discovery as the court considers proper in identifying,
27 locating or disposing of the property; and commence
28 proceedings consistent with any statutory requirements

29 pertaining to third-party rights. At sentencing — or at any
30 time before sentencing if the defendant consents — the order
31 of forfeiture becomes final as to the defendant and shall be
32 made a part of the sentence and included in the judgment.
33 The court may include in the order of forfeiture whatever
34 conditions are reasonably necessary to preserve the property's
35 value pending any appeal.

36 (d) ANCILLARY PROCEEDING.

37 (1) If, as prescribed by statute, a third party files a
38 petition asserting an interest in the forfeited property, the
39 court shall conduct an ancillary proceeding. In that
40 proceeding, the court may consider a motion to dismiss the
41 petition for lack of standing, for failure to state a claim upon
42 which relief can be granted, or for any other ground. For
43 purposes of the motion, the facts set forth in the petition are
44 assumed to be true.

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

54 (3) After the ancillary proceeding, the court shall
55 enter a final order of forfeiture amending the preliminary
56 order as necessary to account for the disposition of any third-
57 party petition.

58 (4) If multiple petitions are filed in the same case,
59 an order dismissing or granting fewer than all of the petitions
60 is not appealable until all petitions are resolved, unless the

61 court determines that there is no just reason for delay and
62 directs the entry of final judgment on one or more but fewer
63 than all of the petitions.

64 (e) STAY OF FORFEITURE PENDING APPEAL. If the
65 defendant appeals from the conviction or order of forfeiture,
66 the court may stay the order of forfeiture upon terms that the
67 court finds appropriate to ensure that the property remains
68 available in case the conviction or order of forfeiture is
69 vacated. The stay will not delay the ancillary proceeding or
70 the determination of a third party's rights or interests. If the
71 defendant's appeal is still pending when the court determines
72 that the order of forfeiture shall be amended to recognize a
73 third party's interest in the property, the court shall amend the
74 order of forfeiture but shall refrain from directing the transfer
75 of any property or interest to the third party until the
76 defendant's appeal is final, unless the defendant consents in

77 writing, or on the record, to the transfer of the property or
78 interest to the third party.

79 (f) SUBSTITUTE PROPERTY. If the applicable statute
80 authorizes the forfeiture of substitute property, the court may
81 at any time consider a motion by the government to order
82 forfeiture of substitute property. If the government makes the
83 requisite showing, the court shall enter an order forfeiting the
84 substitute property, or shall amend an existing preliminary or
85 final order to include that property.

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; instead, such an itemization may be set forth in one or more bills of particulars. See *United States v. Moffitt, Zwerling & Kemler, P.C.*, 83 F.3d 660, 665 (4th Cir. 1996), *aff'g* 846 F. Supp. 463 (E.D. Va. 1994) (*Moffitt I*) (indictment need not list each asset subject to forfeiture; under Rule 7(c), this can be done with bill of particulars). The same applies with respect to property to be forfeited only as “substitute assets.” See *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, 785 (1st Cir. 1995) (Rule 31(e) only applies to jury trials; no special verdict required when defendant waives jury right on forfeiture issues). After the Rule was promulgated in 1972, changes in the law created several problems.

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

Even before *Libretti*, lower courts had determined that criminal forfeiture is a sentencing matter and concluded that criminal trials therefore should be bifurcated so that the jury first returns a verdict on guilt or innocence and then returns to hear evidence regarding the forfeiture. In the second part of the bifurcated proceeding, the jury is instructed that the government must establish the forfeitability of the property by a preponderance of the evidence. See *United States v. Myers*, 21 F.3d 826 (8th Cir. 1994) (preponderance standard applies because criminal forfeiture is part of the sentence in money laundering cases); *United States v. Voigt*, 89 F.3d 1050 (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).

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

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

The second problem with Rule 31(e) concerns the scope of the determination that must be made prior to entering an order of

forfeiture. This issue is the same whether the determination is made by the court or by the jury.

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

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

The problem, of course, is that third parties who might have an interest in the forfeited property are not parties to the criminal case. At the same time, a defendant who has no interest in property

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

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

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

United States v. Hentz, 1996 WL 355327 (E.D. Pa. 1996) (once third party fails to file a claim in the ancillary proceeding, government has clear title under § 853(n)(7) and can market the property notwithstanding third party's name on the deed).

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

Since the enactment of the ancillary proceeding statutes, the requirement in Rule 31(e) that the court (or jury) determine the extent of the defendant's interest in the property as part of the criminal trial has become an unnecessary anachronism that leads more often than not to duplication and a waste of judicial resources. There is no longer any reason to delay the conclusion of the criminal trial with a lengthy hearing over the extent of the defendant's interest in property when the same issues will have to be litigated a second time in the ancillary proceeding if someone files a claim challenging the forfeiture. For example, in *United States v. Messino*, 921 F. Supp. 1231 (N.D. Ill. 1996), the court allowed the defendant to call witnesses to attempt to establish that they, not he, were the true owners of the property. After the jury rejected this evidence and the property was forfeited, the court conducted an ancillary proceeding in which the same witnesses litigated their claims to the same property.

A more sensible procedure would be for the court, once it determines that property was involved in the criminal offense for which the defendant has been convicted, to order the forfeiture of whatever interest a defendant may have in the property without

having to determine exactly what that interest is. If third parties assert that they have an interest in all or part of the property, those interests can be adjudicated at one time in the ancillary proceeding.

This approach would also address confusion that occurs in multi-defendant cases where it is clear that each defendant should forfeit whatever interest he may have in the property used to commit the offense, but it is not at all clear which defendant is the actual owner of the property. For example, suppose A and B are co-defendants in a drug and money laundering case in which the government seeks to forfeit property involved in the scheme that is held in B's name but of which A may be the true owner. It makes no sense to invest the court's time in determining which of the two defendants holds the interest that should be forfeited. Both defendants should forfeit whatever interest they may have. Moreover, to the extent that the current rule forces the court to find that A is the true owner of the property, it gives B the right to file a claim in the ancillary proceeding where he may attempt to recover the property despite his criminal conviction. *United States v. Real Property in Waterboro*, 64 F.3d 752 (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. Under this procedure, the court, as soon as practicable after the verdict in the criminal case, would determine if the property was subject to forfeiture in accordance with the applicable statute, e.g., whether the property represented the proceeds of the offense, was used to facilitate the offense, or was involved in the offense in some other way. The determination could be made by

the court alone based on the evidence in the record from the criminal trial or the facts set forth in a written plea agreement submitted to the court at the time of the defendant's guilty plea, or the court could hold a hearing to determine if the requisite relationship existed between the property and the offense. It would not be necessary to determine at this stage what interest any defendant might have in the property. Instead, the court would order the forfeiture of whatever interest each defendant might have in the property and conduct the ancillary proceeding. If someone files a claim, the court would determine the respective interests of the defendants versus the third party claimants and amend the order of forfeiture accordingly. On the other hand, if no one files a claim in the ancillary proceeding, the court would enter a final order forfeiting the property in its entirety only after the court makes a finding that one of the defendants had a possessory or legal interest in the property. This corresponds to the requirement under current law, at least as it is interpreted in some courts, in instances where Rule 31(e) applies.

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

Because it is not uncommon for sentencing to be postponed for an extended period to allow a defendant to cooperate with the

government in an ongoing investigation, the Rule would allow the order of forfeiture to become final as to the defendant before sentencing, if the defendant agrees to that procedure. Otherwise, the government would be unable to dispose of the property until the sentencing took place.

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

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

Because an ancillary hearing is part of a criminal case, it would not be appropriate to make the Civil Rules applicable in all respects. The amendment, however, describes several fundamental areas in which procedures analogous to those in the Civil Rules may be followed. These include the filing of a motion to dismiss a claim,

conducting discovery, disposing of a claim on a motion for summary judgment, and appealing a final disposition of a claim. Where applicable, the amendment follows the prevailing case law on the issue. *See, e.g., United States v. Lavin*, 942 F.2d 177 (3rd Cir. 1991) (ancillary proceeding treated as civil case for purposes of applying Rules of Appellate Procedure); *United States v. BCCI Holdings (Luxembourg) S.A. (In re Petitions of General Creditors)*, 919 F. Supp. 31 (D.D.C. 1996) (“If a third party fails to allege in its petition all elements necessary for recovery, including those relating to standing, the court may dismiss the petition without providing a hearing”); *United States v. BCCI (Holdings) Luxembourg S.A. (In re Petition of Department of Private Affairs)*, 1993 WL 760232 (D.D.C. 1993) (applying court’s inherent powers to permit third party to obtain discovery from defendant in accordance with civil rules). The provision governing appeals in cases where there are multiple claims is derived from Fed. R. Civ. P. 54(b).

Subdivision (e). Subdivision (e) 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 (e) makes clear, however, that a district court is not divested of jurisdiction over an ancillary proceeding even if the defendant appeals his or her conviction. This allows the court to proceed with the resolution of third party claims even as the appeal is considered by the appellate court. Otherwise, third parties would have to await the conclusion of the appellate process even to *begin* to have their claims heard. *See United States v. Messino*, 907 F. Supp. 1231 (N.D. Ill. 1995) (the district court retains jurisdiction over forfeiture matters while an appeal is pending).

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

Subdivision (f). Subdivision (f) makes clear, as courts have found, that the court retains jurisdiction to amend the order of forfeiture to include substitute assets at any time. *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 (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).

Rule 38. Stay of Execution

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(e) ~~CRIMINAL FORFEITURE~~, NOTICE TO VICTIMS, AND

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RESTITUTION. A sanction imposed as part of the sentence

3 District Court of Guam; in the District Court for the Northern
4 Mariana Islands, except as otherwise provided in articles IV
5 and V of the covenant provided by the Act of March 24, 1976
6 (90 Stat. 263); and in the District Court of the Virgin Islands;
7 ~~and (except as otherwise provided in the Canal Zone) in the~~
8 ~~United States District Court for the District of the Canal~~
9 ~~Zone~~; in the United States Courts of Appeals; and in the
10 Supreme Court of the United States; except that the
11 prosecution of offenses in the District Court of the Virgin
12 Islands shall be by indictment or information as otherwise
13 provided by law.

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COMMITTEE NOTE

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

PROCEDURES FOR THE CONDUCT OF BUSINESS BY THE JUDICIAL CONFERENCE COMMITTEES ON RULES OF PRACTICE AND PROCEDURE

Scope

These procedures govern the operations of the Judicial Conference Committee on Rules of Practice, Procedure, and Evidence (Standing Committee) and the various Judicial Conference Advisory Committees on Rules of Practice and Procedure in drafting and recommending new rules of practice, procedure, and evidence and amendments to existing rules.

Part I - Advisory Committees

1. Functions

Each Advisory Committee shall carry on "a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use" in its particular field, taking into consideration suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and legal commentary.

2. Suggestions and Recommendations

Suggestions and recommendations with respect to the rules should be sent to the Secretary, Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington, D.C. 20544, who shall, to the extent feasible, acknowledge in writing every written suggestion or recommendation so received and shall refer all suggestions and

recommendations to the appropriate Advisory Committee. To the extent feasible, the Secretary, in consultation with the Chairman of the Advisory Committee, shall advise the person making a recommendation or suggestion of the action taken thereon by the Advisory Committee.

3. Drafting Rules Changes

- a. An Advisory Committee shall meet at such times and places as the Chairman may authorize. All Advisory Committee meetings shall be open to the public, except when the committee so meeting, in open session and with a majority present, determines that it is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public and states the reason for closing the meeting. Each meeting shall be preceded by notice of the time and place of the meeting, including publication in the Federal Register, sufficient to permit interested persons to attend.**
- b. The reporter assigned to each Advisory Committee shall, under the direction of the Committee or its Chairman, prepare initial draft rules changes, "Committee Notes" explaining their purpose and intent, copies or summaries of all written recommendations and suggestions received by the Advisory Committee, and shall forward them to the Advisory Committee.**
- c. The Advisory Committee shall then meet to consider the draft proposed new rules and rules amendments, together with Committee Notes, make revisions therein, and submit them for approval of publication to the Standing**

Committee, or its Chairman, with a written report explaining the Committee's action, including any minority or other separate views.

4. Publication and Public Hearings

- a. When publication is approved by the Standing Committee, the Secretary shall arrange for the printing and circulation of the proposed rules changes to the bench and bar, and to the public generally. Publication shall be as wide as practicable. Notice of the proposed rule shall be published in the Federal Register and copies provided to appropriate legal publishing firms with a request that they be timely included in their publications. The Secretary shall also provide copies to the chief justice of the highest court of each state and, insofar as is practicable, to all individuals and organizations that request them.
- b. In order to provide full notice and opportunity for comment on proposed rule changes, a period of at least six months from the time of publication of notice in the Federal Register shall be permitted, unless a shorter period is approved under the provisions of subparagraph d of this paragraph.
- c. An Advisory Committee shall conduct public hearings on all proposed rules changes unless elimination of such hearings is approved under the provisions of subparagraph d of this paragraph. The hearings shall be held at such times and places as determined by the chairman of the Advisory Committee and shall be preceded by adequate notice, including publication in the

Federal Register. Proceedings shall be recorded and a transcript prepared. Subject to the provisions of paragraph six, such transcript shall be available for public inspection.

- d. Exceptions to the time period for public comment and the public hearing requirement may be granted by the Standing Committee or its chairman when the Standing Committee or its chairman determines that the administration of justice requires that a proposed rule change should be expedited and that appropriate public notice and comment may be achieved by a shortened comment period, without public hearings, or both. The Standing Committee may eliminate the public notice and comment requirement if, in the case of a technical or conforming amendment, it determines that notice and comment are not appropriate or necessary. Whenever such an exception is made, the Standing Committee shall advise the Judicial Conference of the exception and the reasons for the exception.

5. Subsequent Procedures

- a. At the conclusion of the comment period the reporter shall prepare a summary of the written comments received and the testimony presented at public hearings. The Advisory Committee shall review the proposed rules changes in the light of the comments and testimony. If the Advisory Committee makes any substantial change, an additional period for public notice and comment may be provided.
- b. The Advisory Committee shall submit proposed rules changes and Committee Notes, as finally agreed upon, to

the Standing Committee. Each submission shall be accompanied by a separate report of the comments received and shall explain any changes made subsequent to the original publication. The submission shall also include minority views of Advisory Committee members who wish to have separate views recorded.

6. Records

- a. The Chairman of the Advisory Committee shall arrange for the preparation of minutes of all Advisory Committee meetings.
- b. The records of an Advisory Committee shall consist of the written suggestions received from the public; the written comments received on drafts of proposed rules, responses thereto, transcripts of public hearings, and summaries prepared by the reporter; all correspondence relating to proposed rules changes; minutes of Advisory Committee meetings; approved drafts of rules changes; and reports to the Standing Committee. The records shall be maintained at the Administrative Office of the United States Courts for a minimum of two years and shall be available for public inspection during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.
- c. Any portion of minutes, relating to a closed meeting and made available to the public, may contain such deletions

as may be necessary to avoid frustrating the purposes of closing the meeting as provided in subparagraph 3a.

- d. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.

Part II - Standing Committee

7. Functions

The Standing Committee shall coordinate the work of the several Advisory Committees, make suggestions of proposals to be studied by them, consider proposals recommended by the Advisory Committees, and transmit such proposals with its recommendation to the Judicial Conference, or recommit them to the appropriate Advisory Committee for further study and consideration.

8. Procedures

- a. The Standing Committee shall meet at such times and places as the Chairman may authorize. All Committee meetings shall be open to the public, except when the committee so meeting, in open session and with a majority present, determines that it is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public and states the reason for closing the meeting. Each meeting shall be preceded by notice of the time and place of the meeting, including publication in the Federal Register, sufficient to permit interested persons to attend.

- b. When an Advisory Committee's final recommendations for rules changes have been submitted, the Chairman and Reporter of the Advisory Committee shall attend the Standing Committee meeting to present the proposed rules changes and Committee Notes.
- c. The Standing Committee may accept, reject, or modify a proposal. If a modification effects a substantial change, the proposal will be returned to the Advisory Committee with appropriate instructions.
- d. The Standing Committee shall transmit to the Judicial Conference the proposed rules changes and Committee Notes approved by it, together with the Advisory Committee report. The Standing Committee's report to the Judicial Conference shall include its recommendations and explain any changes it has made.

9. Records

- a. The Secretary shall prepare minutes of all Standing Committee meetings.
- b. The records of the Standing Committee shall consist of the minutes of Standing and Advisory Committee meetings, reports to the Judicial Conference, and correspondence concerning rules changes including correspondence with Advisory Committee Chairmen. The records shall be maintained at the Administrative Office of the United States Courts for a minimum of two years and shall be available for public inspection during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.

- c. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.

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