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

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

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

SUBJECT Report on Proposed and Pending Rules of Criminal Procedure

DATE: May 17, 1994

I. INTRODUCTION.

At its meeting April 18 & 19, 1994, the Advisory Committee on the Rules of Criminal Procedure acted upon proposed or pending amendments to several Rules of Criminal Procedure. This report addresses those proposals and recommendations to the Standing Committee. A GAP Report and copies of the rules and the accompanying Committee Notes are attached along with a copy of the minutes of the April meeting.

II. RULES OF CRIMINAL PROCEDURE PUBLISHED FOR PUBLIC COMMENT.

A. In General.

Pursuant to action by the Standing Committee at its Summer 1993 meeting, proposed amendments in the following rules were published for public comment: Rule 5. Initial Appearance Before the Magistrate Judge; Rule 10. Arraignment; Rule 43. Presence of the Defendant; Rule 53. Regulation of Conduct in the Court Room; Rule 57. Rules by District Courts; and finally Rule 59. Effective Date; Technical Amendments. A hearing on these amendments was held on April 18, 1994 in Washington, D.C. in conjunction with the Committee's meeting. In addition to the three witnesses who testified at that hearing (which was televised by C-Span), the Committee also carefully considered written comments on the proposed amendments.

The attached GAP Report provides more detailed discussion of the changes

made to the rules since their publication. The following discussion briefly notes any significant changes and the Committee's recommended action:

B. Rule 5. Initial Appearance Before the Magistrate Judge: Exception for UFAP Defendants.

The amendment to Rule 5 would exempt the government from promptly presenting a defendant charged only under 18 U.S.C. § 1073 (Unlawful Flight to Avoid Prosecution, i.e., UFAP) to a magistrate where the United States had no intention of prosecuting the defendant for that offense. Although there were very few comments on the proposed amendment to Rule 5, one commentator suggested a conforming amendment to Rule 40. The Committee agreed with that proposal and as discussed *infra*, has proposed a minor amendment to Rule 40 to reflect the change to Rule 5.

Recommendation: The Advisory Committee, which approved the amendment to Rule 5 by a vote of 9 to 2, recommends that Standing Committee approve Rule 5 and forward it to the Judicial Conference for its approval.

C. Rule 10. Arraignment

The published amendment to Rule 10 would permit use of video teleconferencing to arraign a defendant not present in the courtroom. Of the few written comments received, most were opposed to the amendment, as were two of the witnesses who presented testimony on April 18th. In addition, Judge Diamond of the Committee on Defender Services had requested deferral of the proposed amendment pending completion of a pilot program. Following discussion of the issue the Committee voted by a margin of 10 to 0, with one abstention, to defer any further action on the amendment to Rule 10.

Recommendation: None at this time.

D. Rule 40. Commitment to Another District.

In discussing the published amendment to Rule 5, **supra**, the Committee concluded that some reference should be made in Rule 40(a), which also addresses appearances before federal magistrates. The minor amendment proposed by the Committee simply cross-references the change in Rule 5; a copy of the proposed change and a Committee Note are attached.

Recommendation: The Committee recommends that the amendment to Rule 40 be approved, *without public comment*, and forwarded to the Judicial Conference.

E. Rule 43. Presence of the Defendant; In Absentia Sentencing.

The proposed amendment to Rule 43 was intended to (1) provide for teleconferencing for pretrial sessions where the accused is not in the courtroom, and (2) provide for in absentia sentencing. Based upon its discussion regarding the proposed amendment to Rule 10, *supra*, the Committee voted to delete that provision from Rule 43. The Committee also modified the proposed language in Rule 43(b) to make it clear that in absentia sentencing could take place after jeopardy had attached, including entry of a guilty plea or a nolo contendere plea. The Committee voted by a margin of 9 to 1, with one abstention, to forward the proposed amendment, as modified, to the Standing Committee.

Recommendation: The Committee recommends that Rule 43, as modified, be approved and forwarded to the Judicial Conference, without further publication and comment.

F. Rule 53. Regulation of Conduct in the Court Room

The proposed amendment to Rule 53 would permit broadcasting from, and cameras in, federal criminal trials under guidelines or standards promulgated by the Judicial Conference. The Advisory Committee considered the testimony of one witness, Mr. Steve Brill of Court TV, and several written comments, which were for the most part supportive of the amendment. During the Committee's discussion of the amendment, it was suggested that broadcasting and cameras should only be permitted if both the prosecution and defense agreed to such coverage. The Committee was generally opposed to that suggestion because it would in effect frustrate the purpose of the amendment and any possible pilot programs. It was also suggested that the amendment to Rule 53 should be written in a more neutral tone. That suggestion was also rejected because as published, the rule reflects the view the general rule of no broadcasting or cameras unless appropriate guidelines are established by the Judicial Conference. The Committee ultimately decided, by vote of 9 to 1, to forward the proposed amendment to Rule 53 as it was published for comment.

The Committee agreed that in light of other Committees' interest regarding cameras in the court room, careful coordination with those committees would be required. The Committee also believed strongly that given the special problems associated with criminal trials, that it should be actively involved in the process of formulating appropriate guidelines. To that end, a subcommittee was appointed to draft suggested guidelines and to report to the Committee at its Fall 1994 meeting.

Recommendation: The Advisory Committee recommends that the amendment to Rule 53 be approved and forwarded to the Judicial Conference, with the recommendation that the Advisory Committee on Criminal Rules should be actively involved in drafting any appropriate guidelines.

G. Rule 57. Rules by District Courts

The proposed amendment to Rule 57 mirrors similar amendments in the other procedural rules. Although the Committee was informed that the Bankruptcy Committee had recommended substitution of the word "nonwillful" for "negligent failure," the Committee unanimously approved the amendment to Rule 57 as published. Following brief discussion of the issue, the Committee did delete a brief reference in the Committee Note which referred to untimely requests for trial as being an example of a "negligent failure."

Recommendation: The Committee recommends that Rule 57 be approved and forwarded to the Judicial Conference.

H. Rule 59. Effective Date; Technical Amendments.

The proposed amendment to Rule 59, which also mirrors similar amendments in the other rules, was noncontroversial. The Committee voted unanimously to approve the amendment as published.

Recommendation: The Advisory Committee recommends that the proposed amendment to Rule 59 be approved and forwarded to the Judicial Conference.

III. PROPOSED AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE.

A. In General.

The Advisory Committee at its April 1994 meeting considered amendments to Rules 16 and 32. It recommends that the following amendments be approved for publication and comment by the bench and the bar. Copies of the proposed amendments and Committee Notes are attached.

B. Rule 16(a)(1)(E), (b)(1)(C). Discovery of Experts

The Committee has proposed an amendment to Rule 16 which modifies slightly the provisions dealing with discovery of defense experts. As amended December 1, 1993, Rule 16 requires the government, upon request by the defense, to disclose certain information about its expert witnesses. If the government discloses its experts, it is entitled to reciprocal discovery. At the suggestion of the Department of Justice, the Advisory Committee recommends that Rule 16 be further amended to take into account those cases where the defense, under Rule 12.2 has indicated an intent to present expert testimony on the mental condition of the defendant. Under the proposed amendment to Rule 16(b)(1)(C), once the defense has given notice in accordance with Rule 12.2, the government is entitled to request the defense to disclose additional information about its experts. If the defense complies, it is entitled under Rule 16(a)(1)(F) to reciprocal discovery.

The proposed amendment, and Committee Note are attached to this report.

Recommendation: The Advisory Committee recommends that the proposed amendments to Rule 16 regarding government requested discovery of defense expert testimony be approved for publication and comment by the bench and bar.

C. Rule 16(a)(1)(F), (b)(1)(D). Disclosure of Witness Names and Statements

At its Fall 1993 meeting, the Advisory Committee approved (by a vote of 9 to 1) a proposed amendment to Rule 16 which would require the government, upon request by the defendant, to disclose the names, addresses, and statements of its witnesses at least seven days before trial. As discussed in the Committee Note accompanying the proposed amendment, in 1974 Congress rejected a similar amendment proposed by the Supreme Court after a vigorous protest from the Department of Justice. In the intervening years, similar amendments have been proposed, debated, and rejected by the Advisory Committee. Thus, no amendment addressing the production of witness names has been published for public comment in almost two decades.

At its January 1994 meeting, the Standing Committee considered the Advisory Committee's proposed amendment to Rule 16. Mr. Irvin Nathan from the Department of Justice reiterated the Department's general opposition to the amendment but asked the Standing Committee to defer action on the proposal so that the Department could attempt to reach a compromise on the amendment. Following extensive discussion, the Standing Committee referred the amendment back to the Advisory Committee for additional discussion with the Department of Justice. During the discussion, the view was expressed that referring the matter back to the Advisory Committee would not delay publication and comment. A number of possible changes to the amendment and the Committee Note were also suggested for consideration by the Advisory Committee, including the issue of whether the amendment would be inconsistent with the Jencks Act.

Speaking on behalf of the Department of Justice at the Advisory Committee's April 1994 meeting, Ms. Jo Ann Harris, Assistant Attorney General, Criminal Division, urged the Committee to further defer action on the amendment. As noted in the Committee's minutes, Ms. Harris indicated that the Department was prepared to conduct a thorough study of pretrial discovery of witnesses in an attempt to gather "hard data" on the issue and possibly promulgate internal guidelines for disclosure. She also expressed the view that the proposed amendment did not sufficiently recognize the privacy interests of government witnesses.

The Advisory Committee ultimately voted by a margin of 9 to 1 to approve the amendment, with some minor changes, and recommend to the Standing Committee that the amendment be published for public comment without any further delay.

In summary, the proposed amendment to Rule 16 creates a presumption that the defense is entitled to discovery of the government's witnesses and their statements. The rule recognizes, however, that the government may refuse to disclose that information, in whole, or in part, by filing a nonreviewable, *ex parte*, statement with

the court stating why it believes, under the facts of the particular case, that disclosing the information will threaten the safety of a person or risk the obstruction of justice. The amendment also includes a provision for reciprocal pretrial witness disclosure by the defense.

The current proposed amendment and Committee Note contain several changes from the version originally presented to the Standing Committee. First, the rule no longer contains any requirement that the government disclose the addresses of its witnesses. The Department of Justice persuaded the Committee that disclosing the address of a witness would pose special risks and that assured the Committee that it would, upon request, make the witness available for defense pretrial interviews.

Second, the amendment contains a reciprocal discovery provision; the version presented to the Standing Committee meeting in January 1994 included what amounted to an all or nothing approach. As modified, the amendment now provides that if the government has filed an ex parte statement refusing to disclose some, or all, of the information specified in the rule, the trial court in its discretion may decide how much, if any, reciprocal discovery will be available to the government.

Third, the Committee Note has been expanded to address the concerns raised by the Standing Committee at its January 1994 meeting. In particular, the Note addresses the supercession clause in the Rules Enabling Act and the split in the circuits over whether the Jencks Act forbids pretrial disclosure of witness statements. The Committee anticipates that opponents of the amendment will continue to argue that the provision for pretrial disclosure of witness statements is at odds with the Jencks Act, 18 U.S.C. § 3500 et seq., and therefore is in conflict with Congress' view that disclosure of a witness' statements may not be disclosed prior to that witness testifying at trial. As pointed out in the Committee's Note, Congress has approved a number of amendments expanding federal criminal discovery -- including broadened pretrial discovery for the government. For example, recent amendments to Rule 16 permit defense and government discovery of the identity of expert witnesses and summaries of their expected testimony, even though they potentially provide for pretrial disclosure of what amount to "statements" of witnesses. The proposed amendment to Rule 16 is clearly consistent with that trend.

It is also important to note that although the Jencks Act limits defense pretrial access to certain "statements," *Palermo v. United States*, 360 U.S. 343 (1959), the Supreme Court has concluded that the statute is consistent with the "fair and just administration of criminal justice." *Campbell v. United States*, 365 U.S. 85, 92 (1961). In *Campbell* the Court concluded that to the extent the trial court is required under the statute to dislose the statements after the government witness has testified, the statute "reaffirms" the Court's holding in *Jencks v. United States*, 353 U.S. 657 (1957) that a defendant is entitled to relevant and competent statements for purposes of impeachment.

In promulgating the Jencks Act, Congress recognized the potential danger of witness tampering and safety and in an attempt to strike a balance set time limits on disclosure of their statements. The proposed amendment to Rule 16 is consistent with that approach; it permits the government to block pretrial disclosure where there is a danger to a person's safety or a risk of obstruction of justice.

As discussed in its Note accompanying the amendment, the Advisory Committee is sensitive to following the Rules Enabling Act process and recognizes that ultimately, Congress can accept or reject the amendment.

The Committee continues to believe that the amendment is necessary and appropriate and that it strikes the appropriate balance between assuring witness safety and the need for defense pretrial discovery. The Committee also continues to believe that the amendment will result in more efficient operation of criminal trials.

Recommendation: The Advisory Committee recommends that the proposed amendments to Rule 16 concerning pretrial disclosure of witness names and statements be published for public comment by the bench and bar.

D. Rule 32(d). Sentence and Judgment; Forfeiture Proceedings Before Sentencing

The Committee has proposed that Rule 32, which is currently before Congress, be further amended to provide for forfeiture proceedings before sentencing. The current language of proposed Rule 32(d) simply provides that the sentence may include an order of forfeiture. The proposed amendment would explicitly permit the trial court, in its discretion, to conduct forfeiture proceedings *before* sentencing. As noted in the accompanying Committee Note, the amendment is intended to protect the interests of the government and third parties.

Recommendation: The Advisory Committee recommends that the proposed amendment to Rule 32 be published for public comment by the bench and bar.

Attachments

Gap Report (Rules 5, 40, 43, 53, 57, and 59)
Minutes from April 1994 Meeting
Proposed Amendments (Rules 16 and 32)

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

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

SUBJECT: GAP Report: Explanation of Changes Made Subsequent to the Circulation for Public Comment of Rules 5, 10, 40, 43, 53, 57, and 59.

DATE: May 17, 1994

At its July 1993 meeting the Standing Committee approved the circulation for public comment of proposed amendments to Rules 5, 10, 43, 53, 57 and 59.

All six rules were published in the Fall 1993 with a deadline of April 15, 1994 for any comments. At its meeting on April 18 and 19, 1994 in Washington, D.C., three witnesses presented testimony to the Committee on the proposed amendments. The Advisory Committee has considered the written submissions of members of the public as well as the three witnesses. Summaries of any comments on each Rule, the Rules, and the accompanying Committee Notes are attached.

The Advisory Committee's actions on the amendments subsequent to the circulation for public comment are as follows:

1. **Rule 5. Initial Appearance Before the Magistrate Judge: Exception for UFAP Defendants.**

The Committee made no changes to the proposed amendment to Rule 5. Although there were very few comments on the proposed amendment to Rule 5, one commentator suggested a conforming amendment to Rule 40. The Committee agreed with that proposal and as discussed *infra*, has proposed a minor amendment to Rule 40 to reflect the change to Rule 5.

2. **Rule 10. Arraignment**

After considering the testimony of several witnesses and several written comments, the Committee has decided to defer any further consideration of the proposed amendment to

Rule 10 until its April 1995 meeting.

3. Rule 40. Commitment to Another District.

In discussing the published amendment to Rule 5, **supra**, the Committee concluded that some reference should be made in Rule 40(a), which also addresses appearances before federal magistrates. The minor amendment simply cross-references the change in Rule 5; a copy of the proposed change and a Committee Note are attached.

4. Rule 43. Presence of the Defendant; In Absentia Sentencing.

Based upon testimony of two witnesses and several written comments, the Committee changed the amendment by deleting the provision for video teleconferencing of pretrial sessions. The Committee also modified the proposed language in Rule 43(b) to make it clear that in absentia sentencing could take place after jeopardy had attached, including entry of a guilty plea or a nolo contendere plea.

5. Rule 53. Regulation of Conduct in the Court Room

The Committee made no changes to the proposed amendment to Rule 53 would permit broadcasting from, and cameras in, federal criminal trials under guidelines or standards promulgated by the Judicial Conference. The Advisory Committee considered the testimony of one witness, Mr. Steve Brill of Court TV, and several written comments, which were for the most part supportive of the amendment.

6. Rule 57. Rules by District Courts

No changes were made to the proposed amendment to Rule 57, which mirrors similar amendments in the other procedural rules. Following brief discussion of the issue, the Committee did delete a brief reference in the Committee Note which referred to untimely requests for trial as being an example of a "negligent failure" to follow a local rule.

7. Rule 59. Effective Date; Technical Amendments.

No changes were made to the proposed amendment to Rule 59, which also mirrors similar amendments in the other rules.

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

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 5

I. SUMMARY OF COMMENTS: Rule 5

The Committee received three written comments addressing the proposed amendment to Rule 5. One commentator supported the amendment because it will save judicial and law enforcement resources. The second commentator, writing on behalf of the American Bar Association, opposed the change, inter alia, because it was in conflict with the pertinent ABA Standard. The third commentator simply suggested a conforming amendment to Rule 40.

II. LIST OF COMMENTATORS: Rule 5

1. William J. Genego & Peter Goldberger, NADCL, Washington, D.C., 4-14-94.

2. Charles B. Kuenlen, Esq., Glynco, GA, 12-17-93.

3. Myrna Raeder, Prof., Los Angeles, CA, 4-12-94.

III. COMMENTS: Rule 5

William J. Genego, Esq.
Peter Goldberger, Esq.
National Assoc. of Criminal Defense Lawyers
Washington, D.C.
April 14, 1994.

Mr. Genego and Mr. Goldberger, on behalf of the National Association of Criminal Defense Lawyers, endorses the proposed amendment to Rule 5. They believe that under appropriate circumstances the change will result in saving judicial and law enforcement resources and will facilitate the prompt return of an arrested defendant to the jurisdiction where the prosecution is pending. They suggest that the rule or committee note include some discussion that

the words "without unnecessary delay" mean a period of time of 48 hours.

Charles B. Kuenlen, Esq.
Instructor, Department of the Treasury
Glynco, Georgia
December 17, 1993.

Without commenting directing on the merits of the proposed rule change, Mr. Kuenlen observes that the amendment is in apparent conflict with Rule 40 which also requires appearance before a federal magistrate.

Myrna Raeder
Professor of Law
Southwestern University
Los Angeles, CA,
April 12, 1994.

Writing on behalf of the American Bar Association, Professor Raeder expresses opposition to the amendment. She notes that the amendment is in conflict with the "Pretrial Release" chapter of the *ABA Standards for Criminal Justice* (2d ed. 1986, Supp.) which states that unless an accused is released by lawful means or on citation, the accused is to be taken before a judicial officer promptly after an arrest. Any convenience to law enforcement officers would be greatly outweighed by the important right to appear promptly before a judicial officer.

Rule 5. Initial Appearance Before the Magistrate Judge[1]

(a) IN GENERAL. Except as otherwise provided in this rule, ~~An~~ an officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant ~~shall~~ must take the arrested person without unnecessary delay before the nearest available federal magistrate judge or, ~~in the event that~~ if a federal magistrate judge is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. If a person arrested without a warrant is brought before a magistrate judge, a complaint, satisfying the probable cause requirements of Rule 4(a), must be promptly filed ~~shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause~~. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate judge, the magistrate judge ~~shall~~ must proceed in accordance with the applicable subdivisions of this rule. An officer making an arrest under a warrant issued upon a complaint charging solely a violation of 18 U.S.C. § 1073 need not comply with

1. New matter is underlined; matter to be omitted is lined through. These rules include amendments which became effective on December 1, 1993.

this rule if the person arrested is transferred without unnecessary delay to the custody of appropriate state or local authorities in the district of arrest and an attorney for the government moves promptly, in the district in which the warrant was issued, to dismiss the complaint.

* * * * *

COMMITTEE NOTE

The amendment to Rule 5 is intended to address the interplay between the requirements for a prompt appearance before a magistrate judge and the processing of persons arrested for the offense of unlawfully fleeing to avoid prosecution under 18 U.S.C. § 1073, when no federal prosecution is intended. Title 18 U.S.C. § 1073 provides in part:

> Whoever moves or travels in interstate or foreign commerce with intent...to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which he flees...shall be fined not more than $5,000 or imprisoned not more than five years, or both.
>
> Violations of this section may be prosecuted...only upon formal approval in writing by the Attorney General, the Deputy Attorney General, the Associate Attorney General, or an Assistant Attorney General of the United States, which function of approving prosecutions may not be delegated.

In enacting § 1073, Congress apparently intended to provide assistance to state criminal justice authorities in an effort to apprehend and prosecute state offenders. It also appears that by requiring permission of high ranking officials, Congress intended that prosecutions be limited in number. In fact, prosecutions under this section have been rare. The purpose of the statute is fulfilled when the

person is apprehended and turned over to state or local authorities. In such cases the requirement of Rule 5 that any person arrested under a federal warrant must be brought before a federal magistrate judge becomes a largely meaningless exercise and a needless demand upon federal judicial resources.

In addressing this problem, several options are available to federal authorities when no federal prosecution is intended to ensue after the arrest. First, once federal authorities locate a fugitive, they may contact local law enforcement officials who make the arrest based upon the underlying out-of-state warrant. In that instance, Rule 5 is not implicated and the United States Attorney in the district issuing the § 1073 complaint and warrant can take action to dismiss both. In a second scenario, the fugitive is arrested by federal authorities who, in compliance with Rule 5, bring the person before a federal magistrate judge. If local law enforcement officers are present, they can take custody, once the United States Attorney informs the magistrate judge that there will be no prosecution under § 1073. Depending on the availability of state or local officers, there may be some delay in the Rule 5 proceedings; any delays following release to local officials, however, would not be a function of Rule 5. In a third situation, federal authorities arrest the fugitive but local law enforcement authorities are not present at the Rule 5 appearance. Depending on a variety of practices, the magistrate judge may calendar a removal hearing under Rule 40, or order that the person be held in federal custody pending further action by the local authorities.

Under the amendment, officers arresting a fugitive charged only with violating § 1073 need not bring the person before a magistrate judge under Rule 5(a) if there is no intent to actually prosecute the person under that charge. Two requirements, however, must be met. First, the arrested fugitive must be transferred without unnecessary delay to the custody of state officials. Second, steps must be taken in the appropriate district to dismiss the complaint alleging a violation of § 1073. The rule continues to contemplate that persons arrested by federal officials are entitled to prompt handling of federal charges, if prosecution is intended, and prompt transfer to state custody if federal prosecution is not contemplated.

Rule 40. Commitment to Another District

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

* * * * *

COMMITTEE NOTE

The amendment to Rule 40(a) is a technical, conforming, change to reflect an amendment to Rule 5, which recognizes a limited exception to the general rule that all arrestees must be taken before a federal magistrate judge.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 10

I. SUMMARY OF COMMENTS/TESTIMONY: Rule 10

The Committee received five written comments and heard testimony from two witnesses on the proposed amendment to Rule 10. Support for the amendment was split; the Committee ultimately decided to defer any further action on the amendment until 1995 pending completion of pilot programs on video teleconferencing for arraignments.

II. LIST OF COMMENTATORS/WITNESSES: Rule 10

1. Hon. Gustave Diamond, Chair, Judicial Conference's Committee on Defender Services, Pittsburg, PA, 4-6-94.

2. Kathleen M. Hawk, Dir., Federal Bureau of Prisons, Washington, D.C., 4-15-94.

3. William J. Genego & Peter Goldberger, NADCL, Washington, D.C., 4-14-94.

4. Eduardo Gonzales, Dir., US Marshals Service, Arlington, VA., 4-15-94.

5. Ms. Elizabeth Manton & Mr. Alan Dubois, Raleigh, NC, Testimony, 4-18-94

6. Myrna Raeder, Prof., Los Angeles, CA, 4-12-94.

III. COMMENTS: Rule 10

Hon. Gustave Diamond
Chair, Judicial Conference's Committee on Defender Services
Pittsburg, PA
April 6, 1994

Judge Diamond urged the Committee to defer action on the proposed amendment. He expressed concern about the

potential impact of the amendment on costs for video teleconferencing; he noted that in effect the process would result in a shift of funding from the Bureau of Prisons and Marshals Service to the judiciary's Defender Services appropriation. He added that he was concerned about possible issues of effective representation and noted that deferral would be appropriate pending the results of several pilot programs which could assess video teleconferencing.

Kathleen M. Hawk, Esq.
Director, Federal Bureau of Prisons
Washington, D.C.
April 15, 1994

Citing a number of important reasons, in particular safety, for the amendment, Ms. Hawk reiterated the Bureau of Prisons' support for the change. She noted that the need for the amendment has made clear in caselaw which holds that Rule 10 does not permit video teleconferencing.

William J. Genego, Esq.
Peter Goldberger, Esq.
National Assoc. of Criminal Defense Lawyers
Washington, D.C.
April 14, 1994.

Mr. Genego and Mr. Goldberger, on behalf of the National Association of Criminal Defense Lawyers, opposed the amendment to Rule 10 for a variety of reasons. They believed that the objectives of conserving resources do not justify creation of a rule which permits in absentia arraignments. They noted that there were real questions about the validity of any waiver the ability to consult with counsel. They did recognize, however, that the rule might be justified if the defendant were required to execute a written wavier (joined by counsel) before the arraignment.

Eduardo Gonzales
Director, United States Marshals Service
Arlington, VA.
April 15, 1994

Mr. Gonzales expressed strong support for the amendment, noting that the amendment would increase efficiency, save financial resources of the Marshals and the courts, and increase security for both the "court family" and the public.

Ms. Elizabeth Manton, Esq.
Mr. Alan Dubois, Esq.
Federal Public Defenders
Raleigh, NC
April 18, 1994

Ms. Manton and Mr. Dubois presented live testiomony to the Committee on April 18, 1994. Based upon their experiences in several cases, they were very opposed to the amendment. They cited a number of practical problems that the amendment would raise and reiterated the very important right of the defendant to personally appear in court.

Myrna Raeder
Professor of Law
Southwestern University
Los Angeles, CA,
April 12, 1994.

Writing on behalf of the American Bar Association, Professor Raeder expressed support for the amendment but raiseed a number of practical and financial considerations which she believed should be studied by the Committee. She also suggested that the Judicial Conference should consider running a pilot program in two large urban districts and also consider any existing state arraignment projects.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 43

I. SUMMARY OF COMMENTS/TESTIMONY: Rule 43

The Committee received seven written comments and heard testimony from two witnesses on the proposed amendments to Rule 43. Support for the amendments was split. As a result of the comments, the Committee deleted the provision for video teleconferencing for pretrial sesssions. It also modified lanugage in Rule 43 for sentencing in absentia defendants.

II. LIST OF COMMENTATORS/WITNESSES: Rule 43

1. Hon. Earl Britt, ED North Carolina, 12-10-93.
2. Hon. Gustave Diamond, Chair, Judicial Conference's Committee on Defender Services, Pittsburg, PA, 4-6-94.
3. Hon. Martin Feldman, ED Louisiana, 11-16-93.
4. William J. Genego & Peter Goldberger, NADCL, Washington, D.C., 4-14-94.
5. Eduardo Gonzales, Dir., US Marshals Service, Arlington, VA., 4-15-94.
6. Kathleen M. Hawk, Dir., Federal Bureau of Prisons, Washington, D.C., 4-15-94.
7. Ms. Elizabeth Manton & Mr. Alan Dubois, Raleigh, NC, Testimony, 4-18-94
8. Myrna Raeder, Prof., Los Angeles, CA, 4-12-94.

III. COMMENTS: Rule 43

Hon. Earl Britt
District Judge

ED North Carolina
December 10, 1994

Judge Britt expressed support for the proposed amendment to Rule 43 which would permit video teleconferencing for pretrial sessions. He indicated that he had been part of the Judicial Conference's pilot project and that in his experience, the proceedings had been conducted in a fair and just manner. He expressed concern, however, that the amendment might be construed as providing the defendant with a right to be present during a competency hearing. He urged the Committee to either expressly provide that in competency hearings the defendant's consent is not required or that the amendment was not intended to cover that issue.

Hon. Gustave Diamond
Chair, Judicial Conference's Committee on Defender Services
Pittsburg, PA
April 6, 1994

Judge Diamond urged the Committee to defer action on the proposed amendment to Rule 43 vis a vis video teleconferencing. He expressed concern about the potential impact of the amendment on costs for video teleconferencing; and noted that the process would result in a shift of funding from the Bureau of Prisons and Marshals Service to the judiciary's Defender Services appropriation. He added that he was concerned about possible issues of effective representation and noted that deferral would be appropriate pending the results of several pilot programs which could assess video teleconferencing.

Hon. Martin Feldman
District Judge
ED Louisiana
November 16, 1993

Judge Feldman questioned whether the Committee intended through the amendment to Rule 43(c)(4)(video teleconferencing for pretrial sessions) that the defendant has a right to be present at pretrial conferences.

William J. Genego, Esq.
Peter Goldberger, Esq.
National Assoc. of Criminal Defense Lawyers
Washington, D.C.
April 14, 1994.

Mr. Genego and Mr. Goldberger, on behalf of the National Association of Criminal Defense Lawyers, opposed the amendment to Rule 43(b)(2) which would provide for in absentia sentencing of a defendant. They noted that the amendment was not justified and would mean that absent defendants would automatically lose their right to appeal. They also raised questions about whether the amendment, as published, would also apply to defendants who have pleaded guilty or nolo contendere. They supported the proposed change to (c)(1) and they supported the provision for video teleconferencing for pretrial sessions, provided that the defendant was required to execute a written waiver of the right to be present in court. Finally, they opposed the amendment relating to correction of the sentence without the defendant being present because there was no provision for obtaining consent from the defendant.

Eduardo Gonzales
Director, United States Marshals Service
Arlington, VA.
April 15, 1994

Mr. Gonzales expressed strong support for the amendment vis a vis video teleconferencing for pretrial sessions, noting that the amendment would increase efficiency, save financial resources of the Marshals and the courts, and increase security for both the "court family" and the public.

Kathleen M. Hawk, Esq.
Director, Federal Bureau of Prisons
Washington, D.C.
April 15, 1994

Citing a number of important reasons, in particular

safety, for the amendments to Rule 43 concerning video teleconferencing, Ms. Hawk reiterated the Bureau of Prisons' support for the change. She noted that the need for the amendment has made clear in caselaw which holds that the Rules of Criminal Procedure do not permit video teleconferencing.

Ms. Elizabeth Manton, Esq.
Mr. Alan Dubois, Esq.
Federal Public Defenders
Raleigh, NC
April 18, 1994

Ms. Manton and Mr. Dubois presented live testiomony to the Committee on April 18, 1994. Based upon their experiences in several cases, they were very opposed to the amendment to Rule 43 which would have provided for video teleconferencing for pretrial sessions. They cited a number of practical problems that the amendment would raise and reiterated the very important right of the defendant to personally appear in court.

Myrna Raeder
Professor of Law
Southwestern University
Los Angeles, CA,
April 12, 1994.

Writing on behalf of the American Bar Association, Professor Raeder expressed general support for the amendment to Rule 43 dealing with video teleconferencing of pretrial sessions. She raised a number of practical and financial considerations, however, which she believed should be studied by the Committee. She also suggested that the Judicial Conference should consider running a pilot program in two large urban districts and also consider any existing state arraignment projects.

Rule 43. Presence of the Defendant

(a) PRESENCE REQUIRED. The defendant ~~shall~~ must be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(b) CONTINUED PRESENCE NOT REQUIRED. The further progress of the trial to and including the return of the verdict, and the imposition of sentence, will ~~shall~~ not be prevented and the defendant will ~~shall~~ be considered to have waived the right to be present whenever a defendant, initially present at trial, or having pleaded guilty or nolo contendere,

(1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial), ~~or~~

(2) in a noncapital case, is voluntarily absent at the imposition of sentence, or

~~(2)~~(3) after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which

is such as to justify exclusion from the courtroom.

(c) PRESENCE NOT REQUIRED. A defendant need not be present ~~in the following situations~~:

(1) ~~A corporation may appear by counsel for all purposes.~~ when represented by counsel and the defendant is an organization, as defined in 18 U.S.C. § 18;

(2) ~~In prosecutions for offenses~~ when the offense is punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence~~.~~;

(3) ~~At~~ when the proceeding involves only a conference or ~~argument~~ hearing upon a question of law~~.~~;

(4) ~~At~~ when the proceeding involves a correction ~~reduction~~ of sentence under Rule 35.

COMMITTEE NOTE

The revisions to Rule 43 focus on two areas. First, the amendments make clear that a defendant who, initially present at trial or who has entered a plea of guilty or nolo contendre, but who voluntarily flees before sentencing, may nonetheless be sentenced in absentia. Second, the rule is amended to extend to organizational defendants. In addition, some stylistic changes have been made.

Subdivision (a). The changes to subdivision (a) are stylistic in nature and the Committee intends no substantive

change in the operation of that provision.

Subdivision (b). The changes in subdivision (b) are intended to remedy the situation where a defendant voluntarily flees before sentence is imposed. Without the amendment, it is doubtful that a court could sentence a defendant who had been present during the entire trial but flees before sentencing. Delay in conducting the sentencing hearing under such circumstances may result in difficulty later in gathering and presenting the evidence necessary to formulate a guideline sentence.

The right to be present at court, although important, is not absolute. The caselaw, and practice in many jurisdictions, supports the proposition that the right to be present at trial may be waived through, inter alia, the act of fleeing. *See generally Crosby v. United States*, 113 S.Ct. 748, ____ U.S. ____ (1993). The amendment extends only to noncapital cases and applies only where the defendant is voluntarily absent after the trial has commenced or where the defendant has entered a plea of guilty or nolo contendre. The Committee envisions that defense counsel will continue to represent the interests of the defendant at sentencing.

The words "at trial, or having pleaded guilty or nolo contendere" have been added at the end of the first sentence to make clear that the trial of an absent defendant is possible only if the defendant was previously present at the trial or has entered a plea of guilty or nolo contendere. *See Crosby v. United States*, *supra*.

Subdivision (c). The change to subdivision (c) is technical in nature and replaces the word "corporation" with a reference to "organization," as that term is defined in 18 U.S.C. § 18 to include entities other than corporations.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 53

I. SUMMARY OF COMMENTS/TESTIMONY: Rule 53

The Committee received five written comments and heard testimony from two witnesses on the proposed amendments to Rule 53. With two exceptions, the commentators and witnesses supported the amendment.

II. LIST OF COMMENTATORS/WITNESSES: Rule 53

1. Hon. Donald C. Ashmanskas, Portland OR, 12-8-93.
2. Steven Brill, Court TV, Washington, D.C. 4-18-94.
3. Prof. Edward Cooper, Ann Arbor, Mich., 1-16-94.
4. Timothy B. Dyk, Esq., Washington, D.C., 4-15-94.
5. William J. Genego & Peter Goldberger, NADCL, Washington, D.C., 4-14-94.
6. Rory K. Little, Esq., ND CA, 4-15-94
7. Myrna Raeder, Prof., Los Angeles, CA, 4-12-94.

III. COMMENTS: Rule 53

Hon. Donald C. Ashmanskas
United States Magistrate Judge
Portland OR
December 8, 1993

Judge Ashmanskas indicated that he is strongly opposed to the proposed amendment to Rule 53. He stated that his opposition is based upon 18 years of experience during which he had observed a number of horrible experiences re cameras in the court room. He noted that with the exception of coverage for naturalization, ceremonial, investiture proceedings or for educational purposes, cameras should be

completely banned from the courthouse.

Mr. Steven Brill
Chairman, American Lawyer Media, L.P.
Washington, D.C.
April 18, 1994

Mr. Brill testified before the Committee on April 18, 1994 and presented information on how broadcasting of trials can be conducted with little or no disruption to the proceedings. He also included results of a survey of state judges which generally supported broadcasting of trials.

Prof. Edward Cooper
Reporter, Civil Rules Advisory Committee
Ann Arbor, Mich.
January 16, 1994

Professor Cooper suggested that the term "standards" be substituted for the term "guidelines." The former term is used in Civil Rule 5(e) and Appellate Rule 25(a).

Timothy B. Dyk, Esq.
Washington, D.C.
April 15, 1994

Mr. Dyk indicated in both a written statement and during oral testimony that he represents various news organizations which support the amendment to Rule 53. Citing points made in the Committee Note to the amendment, he indicated that the Judicial Conference should have the flexibility to adopt new policies for media coverage of federal criminal trials. He noted that the amendment would do no more than transfer sole jurisdiction over the issues regarding cameras and audio broadcasting to the Judicial Conference.

William J. Genego, Esq.
Peter Goldberger, Esq.
National Assoc. of Criminal Defense Lawyers
Washington, D.C.

April 14, 1994.

Mr. Genego and Mr. Goldberger, on behalf of the National Association of Criminal Defense Lawyers, support the amendment and applaud attempts to give the public greater access to federal criminal proceedings. The dangers once associated with broadcasting trials are not well founded and there are substantial public benefits in doing so.

Rory K. Little, Esq.,
United States Attorney
ND, California
April 15, 1994

Mr. Little, citing years of experience in both appellate and trial courts, stated strong opposition to the proposed amendment to Rule 53. He indicated that although few may be willing to admit it, lawyers do act differently in front of cameras in a courtroom and that permitting broadcasting of trials will be distorted and lengthened with such posturing and preening. Secondly, broadcasting trials will lead to additional costs in both time and expense as the parties and the courts debate whether a particular trial should be broadcasted. He also urged the Committee not to "punt" on this issue by simply deferring to the Judicial Conference; in his view, the Committee should stop any attempts to experiment with broadcasting of trials.

Myrna Raeder
Professor of Law
Southwestern University
Los Angeles, CA,
April 12, 1994.

Writing on behalf of the American Bar Association, Professor Raeder expressed general support for the amendment to Rule 53

Rule 53. Regulation of Conduct in the Court Room

The taking of photographs in the court room during the progress of judicial proceedings or ~~radio~~ broadcasting of judicial proceedings from the court room ~~shall~~ must not be permitted by the court except as such activities may be authorized under guidelines promulgated by the Judicial Conference of the United States.

COMMITTEE NOTE

The amendment to Rule 53 marks a shift in the federal courts' regulation of cameras in the court room and the broadcasting of judicial proceedings. The change does not require the courts to permit such activities in criminal cases. Instead, the rule authorizes the Judicial Conference to do so under whatever guidelines it deems appropriate.

The debate over cameras in the court room has subsided due to several developments in the last decade. First, the Supreme Court's decision in *Chandler v. Florida*, 448 U.S. 560 (1981) made clear that it is not a denial of due process to permit cameras at criminal trials. Second, a large majority of the state courts now permit photographic and broadcasting coverage of criminal trials, without significant interruption in the proceedings or adverse impact on the participants. Third, developments in video and audio technology have enabled coverage of judicial proceedings to be accomplished with little or no interruption; some courts have adopted rules requiring pooling of coverage, which seems to even further reduce the likelihood of disruption.

In 1990 the Judicial Conference approved a three-year pilot program with audio coverage and photographic coverage of civil proceedings in selected trial and appellate courts. The Conference declined to apply the program to criminal proceedings -- because of the absolute ban of such activities in Rule 53.

In adopting the amendment the Committee was persuaded, in part, by the fact that despite the wide, and almost common, presence of cameras in court rooms there has not been a long list of complaints or a parade of horrible experiences. To the contrary, the Committee believed that judicial decorum might be enhanced if the media is able to observe, and record, the proceedings from a location outside the court room. The Committee also recognized that the criminal justice system might be better understood, and appreciated, if criminal proceedings are made readily available to the public at large. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980)(vital role of print and electronic media as surrogates for the public supports opening of courts to audio and camera coverage).

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 57

I. SUMMARY OF COMMENTS/TESTIMONY: Rule 57

The Committee received one written comment on the proposed amendment to Rule 57. That comment supported the changes.

II. LIST OF COMMENTATORS/WITNESSES: Rule 57

1. William J. Genego & Peter Goldberger, NADCL, Washington, D.C., 4-14-94.

III. COMMENT: Rule 57

William J. Genego, Esq.
Peter Goldberger, Esq.
National Assoc. of Criminal Defense Lawyers
Washington, D.C.
April 14, 1994.

Mr. Genego and Mr. Goldberger, on behalf of the National Association of Criminal Defense Lawyers, support the amendment to Rule 57. They see no reason not to adopt a uniform numbering system for local rules. They also believe that the provision forbidding the loss of rights for negligent failure to follow a local rule properly respects the rights of the litigants without "denigrating the necessity for attorneys to attempt to comply..." with the local rules. Finally, the provision forbidding imposition of penalties for failure to comply with unpublished rules will permit judges to use such rules but not to unfairly punish litigants.

Rule 57. Rules by District Courts

(a) IN GENERAL.

(1) Each district court ~~by action of~~ acting by a majority of ~~the~~ its district ~~the~~ judges ~~thereof~~ may ~~from time to time~~, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice ~~not inconsistent these rules~~. A local rule must be consistent with -- but not duplicative of -- Acts of Congress and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

(2) A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a negligent failure to comply with the requirement.

(b) PROCEDURE WHEN THERE IS NO CONTROLLING LAW. A judge may regulate practice in any manner consistent with federal law, these rules, and local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator has been furnished in the particular case

with actual notice of the requirement.

(c) EFFECTIVE DATE AND NOTICE. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of the rules and amendments so made by any district court ~~shall~~ must upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts and ~~shall~~ must be made available to the public. ~~In all cases not provided for by rule, the district judges and magistrate judges may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.~~

COMMITTEE NOTE

Subdivision (a). This rule is amended to reflect the requirement that local rules be consistent not only with the national rules but also with Acts of Congress. The amendment also states that local rules should not repeat national rules and Acts of Congress.

The amendment also requires that the numbering of local rules conform with any numbering system that may be prescribed by the Judicial Conference. Lack of uniform numbering might create unnecessary traps for counsel and litigants. A uniform number system would make it easier for an increasingly national bar to locate a local rule that applies to a particular procedural issue.

Paragraph (2) is new. Its aim is to protect against loss of rights in the enforcement of local rules relating to matters of form. The proscription of paragraph (2) is narrowly drawn -- covering only violations attributable to negligence and only those involving local rules directed to matters of form. It does not limit the court's power to impose substantive penalties upon a party if it or its attorney stubbornly or repeatedly violates a local rule, even one involving merely a matter of form. Nor does it affect the court's power to enforce local rules that involve more than mere matters of form -- for example, a local rule requiring that the defendant waive a jury trial within a specified time.

Subdivision (b). This rule provides flexibility to the court in regulating practice when there is no controlling law. Specifically, it permits the court to regulate practice in any manner consistent with Acts of Congress, with rules adopted under 28 U.S.C. § 2072, and with the district's local rules. This rule recognizes that courts rely on multiple directives to control practice. Some courts regulate practice through the published Federal Rules and the local rules of the court. Some courts also have used internal operating procedures, standing orders, and other internal directives. Although such directives continue to be authorized, they can lead to problems. Counsel or litigants may be unaware of the various directives. In addition, the sheer volume of directives may impose an unreasonable barrier. For example, it may be difficult to obtain copies of the directives. Finally, counsel or litigants may be unfairly sanctioned for failing to comply with a directive. For these reasons, the amendment disapproves imposing any sanction or other disadvantage on a person for noncompliance with such an internal directive, unless the alleged violator has been furnished in a particular case with actual notice of the requirement.

There should be no adverse consequence to a party or attorney for violating special requirements relating to practice before a particular judge unless the party or attorney has actual notice of those requirements. Furnishing litigants with a copy outlining the judge's practices -- or attaching instructions to a notice setting a case for conference or trial -- would suffice to give actual

notice, as would an order in a case specifically adopting by reference a judge's standing order and indicating how copies can be obtained.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 59

I. SUMMARY OF COMMENTS/TESTIMONY: Rule 59

The Committee received no written comments on the proposed amendments to Rule 59.

II. LIST OF COMMENTATORS/WITNESSES: Rule 59

None

III. COMMENTS: Rule 59

None

Rule 59. Effective Date; Technical Amendments

(a) These rules take effect on the day which is 3 months subsequent to the adjournment of the first regular session of the 79th Congress, but if that day is prior to September 1, 1945, then they take effect on September 1, 1945. They govern all criminal proceedings thereafter commenced and so far as just and practicable all proceedings then pending.

(b) The Judicial Conference of the United States may amend these rules to correct errors in spelling, cross-references, or typography, or to make technical changes needed to conform these rules to statutory changes.

COMMITTEE NOTE

The rule is amended to enable the Judicial Conference to make minor technical amendments to these rules without having to burden the Supreme Court and Congress with reviewing such changes. This delegation of authority will relate only to uncontroversial, nonsubstantive matters.

Rule 16. Discovery and Inspection[1]

(a) GOVERNMENTAL DISCLOSURE OF EVIDENCE.

(1) Information Subject to Disclosure.

* * * * *

(E) EXPERT WITNESSES. At the defendant's request, the government ~~shall~~ must disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case in chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) of this rule and the defendant complies, the government, at the defendant's

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1. New matter is underlined and matter to be omitted is lined through.

request must disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, and 705 as evidence at trial on the issue of the defendant's mental condition. ~~This~~--The summary provided under this subdivision must describe the witnesses' opinions, the bases and the reasons therefor, and the witnesses' qualifications.

(F) NAMES AND STATEMENTS OF WITNESSES. At the defendant's request in a non-capital case, the government, no later than seven days before trial, must disclose to the defendant:

(1) the names of the witnesses the government intends to call during its case in chief; and

(2) any statements, as defined in Rule 26.2(f), made by those witnesses.

If the attorney for the government believes in good faith that pretrial disclosure of this information will threaten the safety of any person or will lead to an obstruction of justice, disclosure of that information is not required if the attorney for the government submits to the court, ex parte and under seal, an unreviewable written statement containing the names of the witnesses and stating why the government believes that the specified information cannot safely be disclosed.

* * * * *

(2) *Information Not Subject to*

Disclosure. Except as provided in paragraphs (A), (B), (D), ~~and~~ (E)~~.~~ and (F) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or any other government agents ~~in connection with the investigation or prosecution of~~ investigating or prosecuting the case. ~~Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.~~

* * * * *

(b) THE DEFENDANT'S DISCLOSURE OF EVIDENCE.

(1) *Information Subject to*

Disclosure.

* * * * *

(C) EXPERT WITNESSES. The defendant, at the government's request, must disclose to the government a written summary of testimony the defendant intends to use under Rules 702, 703 and 705 of the Federal Rules of Evidence as evidence at trial ~~If~~ if (i) the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, or (ii) the defendant has provided notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition. ~~the defendant, at the government's request, must disclose to the government a written summary of testimony the defendant intends to~~

~~use under Rules 702, 703, and 705 of the Federal Rules of Evidence as evidence at trial.~~ This summary must describe the opinions of the witnesses, the bases and reasons therefor, and the witnesses' qualifications.

(D) NAMES AND STATEMENTS OF WITNESSES. If the defendant requests disclosure under subdivision (a)(1)(F) of this rule, and the government complies, the defendant, at the request of the government, must disclose to the government before trial the names and statements of witnesses -- as defined in Rule 26.2(f) -- the defense intends to call during its case in chief. The court may limit the government's right to obtain disclosure from the defendant if the government has filed

an ex parte statement under subdivision (a)(1)(F).

* * * * *

COMMITTEE NOTE

The amendments to Rule 16 cover two issues. The first addresses the ability of the government to request the defense to disclose information concerning its expert witnesses on the issue of the defendant's mental condition. The second provides for pretrial disclosure of witness names and addresses.

Subdivision (a)(1)(E). Under Rule 16(a)(1)(E), as amended in 1993, the defense is entitled to disclosure of certain information about expert witnesses which the government may call during the trial. The amendment is a reciprocal disclosure provision which is triggered by a government request for information concerning defense expert witnesses provided for in an amendment to (b)(1)(C), *infra*.

Subdivision (a)(1)(F). No subject has engendered more controversy in the Rules Enabling Act process over many years than pretrial discovery of the witnesses the government intends to call at trial. In 1974, the Supreme Court approved an amendment to Rule 16 that would have provided pretrial disclosure to a defendant of the names of government witnesses, subject to the government's right to seek a protective order. Congress, however, refused to approve the rule in the face of vigorous opposition by the Department of Justice. In recent

years, a number of proposals have been made to the Advisory Committee to reconsider the rule approved by the Supreme Court. The opposition of the Department of Justice has remained constant, however, as it has argued that the threats of harm to witnesses and obstruction of justice have increased over the years along with the increase in narcotics offenses, continuing criminal enterprises, and other crimes committed by criminal organizations.

Notwithstanding the absence of an amendment to Rule 16, the federal courts have continued to struggle with the issue of whether the Rule, read in conjunction with the Jencks Act, permits a court to order the government to disclose its witnesses before they have testified at trial. *See United States v. Price*, 448 F.Supp. 503 (D. Colo 1978)(circuit by circuit summary of whether government is required to disclose names of its witnesses to the defendant).

The Committee has recognized that government witnesses often come forward to testify at risk to their personal safety, privacy, and economic well being. The Committee recognized, at the same time, that the great majority of cases do not involve any such risks to witnesses.

The Committee shares the concern for safety of witnesses and third persons and the danger of obstruction of justice. But it is also concerned with the practical hardships defendants face in attempting to prepare for trial without adequate discovery, as well as the burden placed on court resources and on jurors by unnecessary trial delay. The Federal Rules of Criminal Procedure recognize the importance of discovery in situations in

which the government might be unfairly surprised or disadvantaged without it. In several amendments -- approved by Congress since its rejection of the proposed 1974 amendment to Rule 16 regarding disclosure of witnesses -- the rules now provide for defense disclosure of certain information. See, e.g., Rule 12.1, Notice of Alibi; Rule 12.2, Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition; and Rule 12.3, Notice of Defense Based Upon Public Authority. The Committee notes also that both Congress and the Executive Branch have recognized for years the value of liberal pretrial discovery for defendants in military criminal prosecutions. *See* D. Schlueter, *Military Criminal Justice: Practice and Procedure*, § 10(4)(A) (3d ed. 1992)(discussing automatic prosecution disclosure of government witnesses and statements). Similarly, pretrial disclosure of witnesses is provided for in many State criminal justice systems where the caseload and the number of witnesses is much greater than that in the federal system. *See generally* Clennon, *Pre-Trial Discovery of Witness Lists: A Modest Proposal to Improve the Administration of Criminal Justice in the Superior Court of the District of Columbia*, 38 Cath. U. L. Rev. 641, 657-674 (1989)(citing state practices).

The arguments against similar discovery for defendants in federal criminal trials seem unpersuasive and ignore the fact that the defendant is presumed innocent and therefore is presumptively as much in need of information to avoid surprise as is the government. The fact that the government bears the burden of proving all elements of the charged offense beyond a reasonable doubt is not a compelling reason for denying a

defendant adequate means for responding to government evidence. In providing for enhanced discovery for the defense, the Committee believes that the danger of unfair surprise to the defense and the burden on courts and jurors will be reduced in many cases and that trials in those cases will be fairer and more efficient.

The Advisory Committee regards the addition of Rule 16(a)(1)(F) as a reasonable step forward and as a rule which must be carefully monitored. In this regard it is noteworthy that the amendment rests on three assumptions which are as follows: First, the government will act in good faith, and there will be cases in which the information available to the government will support a good faith belief as to danger although it does not constitute "hard" evidence to prove the actual existence of danger. Second, in most cases judges will not be in a better position than the government to gauge potential danger to witnesses. And third, post-trial litigation as to the sufficiency of government reasons in every case of an ex parte submission under seal would result in an unacceptable drain on judicial resources.

The Committee considered several approaches to discovery of witness names and statements. In the end, it adopted a middle ground between complete disclosure and the existing Rule 16. The amendment requires the government to provide pretrial disclosure of names of witnesses and their statements unless the attorney for the government submits, ex parte and under seal, to the trial court written reasons, based upon the facts relating to the individual case, why some or all of this information cannot safely be disclosed. The amendment adopts an

approach of presumptive disclosure that is already used in a significant number of United States Attorneys offices. While the amendment recognizes the importance of discovery in all cases, it protects witnesses and information when the government has a good faith basis for believing that disclosure will pose a threat to the safety of a person or will lead to an obstruction of justice.

The provision that the government provide the names and statements no later than seven days before trial should eliminate some concern about the safety of witnesses and some fears about possible obstruction of justice. The seven-day provision extends only to noncapital cases; currently, the government is required in such cases to disclose the names of its witnesses at least three days before trial. The Committee believes that the difference in the timing requirements is justified in light of the fact that any danger to witnesses would be greater in capital cases.

The amendment provides that the government's ex parte submission of reasons for not disclosing the requested information will not be reviewed, either by the trial or the appellate court. The Committee considered, but rejected, a mechanism for post-trial review of the government's statement. It was concerned that such *ex parte* statements could become a subject of collateral litigation in every case in which they are made. While it is true that under the rule the government could refuse to disclose a witness' name and statement even though it lacks sufficient evidence for doing so in an individual case, the Committee found no reason to assume that bad faith on the

part of the prosecutor would occur. The Committee was certain, however, that it would require an investment of vast judicial resources to permit post-trial review of all submissions. Thus, the amendment provides for no review of government submissions. No defendant will be worse off under the amended rule than under the current version of Rule 16, because the current version of Rule 16 allows the government to keep secret the information covered by the amended rule whether or not it has a good faith reason for doing so.

Perhaps the most critical aspect of the amendment is the requirement that the government disclose the statements of its witnesses before trial, unless it files a statement indicating why it cannot do so. On its face, the amendment creates a potential conflict with the Jencks Act, 18 U.S.C. § 3500 which only requires the government to disclose its witnesses' statements at trial, *after* they have testified. *Palermo v. United States*, 360 U.S. 343 (1959). But the amendment is consisent with the Act to the extent that it reflects the importance of defense discovery in criminal cases. In *Campbell v. United States*, 365 U.S. 85, 92 (1961) the Court stated that to the extent the Act requires disclosure of any statements by government witnesses after they have testified, the statute "reaffirms" the Court's decision in *Jencks v. United States*, 353 U.S. 657 (1957) that a defendant is entitled to relevant and competent statements for the purposes of impeachment. In promulgating the Jencks Act, Congress recognized the potential dangers of witness tampering and safety and obstruction of justice and attempted to strike a balance between those concerns and the value of

discovery to the defense. The amendment to Rule 16 is consistent with that approach; it permits the government to block pretrial disclosure where there is a danger to a person's safety or their is a risk of obstruction of justice.

The amendment is clearly consistent with other amendments to other Federal Rules of Criminal Procedure, approved by Congress, which extend defense discovery of statements at some pretrial proceedings. *See, e.g.*, 26.2(g) and pretrial discovery of expert witness testimony.

In proposing the amendment to Rule 16 the Committee was fully cognizant of the respective roles of the Judicial, Legislative, and Executive branches in amending the rules of procedure and believed it appropriate to offer this important change in conformity with the Rules Enabling Act. 28 U.S.C. §§ 2072 and 2075. The Committee views the amendment as a purely procedural change. Under the Rules Enabling Act, the proposed change to Rule 16 will provide Congress with an opportunity to review the extent and application of the Jencks Act and if it agrees with the amendment, permit the it to supercede any conflicting statutory provision, under 28 U.S.C. § 2072(b). *See* Carrington, *"Substance" and "Procedure" In the Rules Enabling Act*, 1989 Duke L.J. 281, 323 (1989)("In authorizing supercession and assuming responsibility for a view of promulgated rules, Congress demands that it be asked whether a proposed rule conflicts with a procedural arrangement previously made by Congress and, if so, whether the arrangement is one on which the Congress will insist.").

It should also be noted that the amendment does not preclude either the defendant or the government from seeking protective or modifying orders from the court under subdivision (d) of this rule.

Subdivision (b)(1)(C). Amendments in 1993 to Rule 16 included provisions for pretrial disclosure of information about both defense and government expert witnesses. Those disclosures are triggered by defense requests for the information. If the defense make such requests and complies, the government is entitled to similar, reciprocal discovery. The amendment to Rule 16(b)(1)(C) provides that if the defendant has notified the government under Rule 12.2 of an intent to rely on expert testimony to show the defendant's mental condition, the government may request the defense to disclose information about its expert witnesses. While Rule 12.2 insures that the government will not be surprised by the nature of the defense or that the defense intends to call an expert witness, that rule makes no provision for discovery of the expected testimony or qualifications of the expert witness. The amendment provides the government with the limited right to respond to the notice provided under Rule 12.2 by requesting more specific information about the expert. If the government requests the specified information, and the defense complies, the defense is entitled to reciprocal discovery under an amendment to subdivision (a)(1)(E), *supra*.

Subdivision (b)(1)(D). The amendment, which provides for reciprocal discovery of defense witness names and statements, is triggered by compliance with a defense request made under subdivision (a)(1)(F). If

the government withholds any information requested under that provision, the court in its discretion may limit the government's right to disclosure under this subdivision. The amendment provides no specific deadline for defense disclosure, as long as it takes place before trial starts.

Rule 32. Sentence and Judgment[1]

(d) JUDGMENT.

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(2) *Criminal Forfeiture.* ~~When a verdict contains a finding of criminal forfeiture, the judgment must authorize the Attorney General to seize the interest or property subject to forfeiture on terms that the court considers proper.~~ If a verdict contains a finding that property is subject to a criminal forfeiture, the court may enter an order of forfeiture after providing notice to the defendant and a reasonable opportunity to be heard as to the timing and form of the order. The court may

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1. New matter is underlined; matter to be omitted is lined through. This rule includes amendments transmitted to Congress on April 29, 1994, which will become effective on December 1, 1994, unless Congress acts otherwise.

enter the order of forfeiture at any time before sentencing, but not sooner than eight days after the return of the verdict or the disposition of a motion for a new trial, a motion for judgment of acquittal, or a motion to arrest the judgment. The order of forfeiture must authorize the Attorney General to seize the property subject to forfeiture, to conduct such discovery as the court may deem proper to facilitate the identification, location, or disposition of the property, and to begin proceedings consistent with any statutory requirements pertaining to ancillary hearings and the rights of third parties. At the time of sentencing, the order of forfeiture must be made a part of the sentence and included in the judgment.

COMMITTEE NOTE

Subdivision (d)(2). A provision for including a verdict of criminal forfeiture as a part of the sentence was added in 1972 to Rule 32. Since then, the rule has been interpreted to mean that any forfeiture order is a part of the judgment of conviction and cannot be entered before sentencing. *See, e.g., United States v. Alexander*, 772 F. Supp. 440 (D. Minn. 1990).

Delaying forfeiture proceedings, however, can pose real problems, especially in light of the implementation of the Sentencing Reform Act in 1987 and the resulting delays between verdict and sentencing in complex cases. First, the government's statutory right to discover the location of property subject to forfeiture is triggered by entry of an order of forfeiture. *See* 18 U.S.C. § 1963(k) and 21 U.S.C. § 853(m). If that order is delayed until sentencing, valuable time may be lost in locating assets which may have become unavailable or unusable. Second, the ability of third person's with an interest in the property subject to forfeiture must also wait to petition the court to begin ancillary proceedings until the forfeiture order has been entered. *See* 18 U.S.C. § 1963(l) and 21 U.S.C. § 853(m). And third, because the government cannot actually seize the property until an order of forfeiture is entered, it may be necessary for the court to enter restraining orders to maintain the status quo.

The amendment to Rule 32 is intended to address those concerns by specifically recognizing the authority of the court to enter a forfeiture order before sentencing.

Entry of an order of forfeiture before sentencing rests within the discretion of the court, which may take into account anticipated delays in sentencing, the nature or the property, and the interests of the defendant, the government, and third persons.

The amendment permits the court to enter its order of forfeiture at any time before sentencing, but not sooner than eight days after the entry of the court's verdict or its disposition of a motion for new trial under Rule 33, a motion for judgment of acquittal under Rule 29, or a motion for arrest of the judgment under Rule 34. Nothing in the rule, however, prevents the court and the parties from considering the issue of forfeiture in the interim. Before entering the order of forfeiture the court must provide notice to the defendant and a reasonable opportunity to be heard on the question of timing and form of any order of forfeiture.

The rule specifies that the order, which must ultimately be made a part of the sentence and included in the judgment, must contain authorization for the Attorney General to seize the property in question and to conduct appropriate discovery and to begin any necessary ancillary proceedings to protect the interest of third parties who have an interest in the property.