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

AGENDA VI
Washington, D.C.
June 17-19, 1993

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

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

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

DATE: May 14, 1993

I. INTRODUCTION

At its meeting in April 1993, the Advisory Committee on the Rules of Criminal Procedure acted upon proposed or pending amendments to a number of Rules of Criminal Procedure. This report addresses those proposals and the 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 Committee's April 1993 meeting.

II. RULES OF CRIMINAL PROCEDURE PUBLISHED FOR PUBLIC COMMENT.

A. In General

In July 1992, the Standing Committee approved amendments to Rules 16 and 29 but directed publication for public comment be deferred pending a relocation of the Rules Committee Support Office. In December 1992, the Standing Committee approved amendments to Rules 32 and 40 and directed that all four rules (16, 29, 32, and 40) be published on an expedited basis with the comment period to end on April 15, 1993. Comments were received on the proposed amendments and were carefully considered by the

Advisory Committee at its April 1993 meeting in Washington, D.C. In addition, the Committee received the testimony of two witnesses at that same meeting.

The GAP Report provides a 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 16(a)(1)(A). Production of Statements by Organizational Defendants.

The Committee made a minor change to the rule. The Committee changed the rule to reflect that the defense is entitled to discover the statements of persons, *whom the government contends*, were in a position to bind an organizational defendant. The Note was also changed to indicate that the rule does not require the defense to stipulate or admit that a particular person was in a position to bind the organization.

The Committee recommends that Rule 16(a)(1)(A), as amended be approved by the Standing Committee and forwarded to the Judicial Conference for its approval.

C. Rule 29(b). Delayed Ruling on Judgment of Acquittal.

Although the Committee made no changes to the rule, it did make a minor change to the Committee Note to reflect that on appeal of a delayed ruling on a motion for judgment of acquittal, the appellate court would also be limited to consideration of the evidence presented before the motion was made.

The Advisory Committee recommends that the Standing Committee approve Rule 29 and forward it to the Judicial Conference for its approval.

D. Rule 32. Sentence and Judgment.

The Advisory Committee has made several changes to the rule and the Committee Note. They are as follows:

1. Time Limits:

The Committee changed Rule 32(a) to retain the current language that sentencing should take place "without unnecessary delay." The rule continues to

provide, however, that the internal time limits in Rule 32(b)(6) will be followed unless the court advances or shortens them.

2. Presence of Counsel:

The Committee changed subdivision (b)(2) to provide that the defendant's counsel is "entitled to notice and a reasonable opportunity" to attend any interview. The Note was also changed to indicate that the burden should be on counsel, once notice is given, to respond. The Note was also modified to indicate that the Committee believed that the term "interview" should extend only to communications initiated by the probation officer for the purpose of obtaining information to be used in the presentence report.

3. Probation Officer's Determination of Applicable Sentencing Classification:

As published, subdivision (b)(4)(B) required the probation officer to include in the presentence report the classification of the offense which the probation officer "determines" to apply. In response to comments on the proposal, the Committee replaced the word "determines" with the word "believes."

4. Availability of Nonprison Programs

A minor change was made in Rule 32(b)(4)(E) to clarify that the presentence report need not include information about nonprison programs and resources except in appropriate cases.

5. Filing of Original Objections:

The Committee added a comment in the Note to indicate that nothing in the rule prohibits the court from requiring the parties to file their objections with the court or have them included in full as a part of the addendum to the presentence report. *See* Rule 32(b)(6)(B).

6. Probation Officer's Authority to Require Meeting:

In response to comments that Rule 32(b)(6)(B) might create incorrect perceptions about the probation officer's role in sentencing by authorizing the probation officer to "require" the parties to meet, the Committee modified the language to state that the

probation officer "may meet" with the parties to discuss their objections.

7. Additional Evidence at Sentencing Hearing:

In Rule 32(c)(1) the Committee modified the language addressing the court's discretion to permit the parties to present additional information at the sentencing hearing. The words "to introduce testimony or other evidence on the objections," were changed to read, "to introduce evidence." The modification gives the court the discretion to decide if the offered evidence, in whatever form, should be admitted. The Committee Note was expanded to recognize that in appropriate cases, due process might require the court to hear the offered evidence.

8. Disclosure of Information Not Included in the Presentence Report:

Rule 32(c)(3)(A) was changed to provide that if the court had received information which has been excluded from the presentence report under (b)(5) because it is confidential, etc., the court must create a written summary of that information and provide it to the parties -- if the court intends to rely on the information in sentencing. As published, the court had the option of summarizing that information orally or in writing. The language was also modified slightly to require the court to give the defense a reasonable opportunity to comment on the information. The Committee Note was amended to recognize that the reasonable opportunity requirement might necessitate a continuance.

9. Notification of Right to Appeal:

Rule 32(c)(5) was changed to reflect the differences in the right to appeal, depending on whether the defendant has entered a guilty or not guilty plea.

The Advisory Committee recommends that Rule 32, as amended, be approved by the Standing Committee and forwarded to the Judicial Conference for its approval.

E. Rule 40(d). Conditional Release of Probationer.

The Committee received no comments on, and made no changes in, the proposed language of Rule 40(d) or the

Committee Note.

The Advisory Committee recommends that Rule 40(d) be approved by the Standing Committee and forwarded to the Judicial Conference for its approval.

III. PROPOSED AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE.

A. In General.

The Advisory Committee at its April 1993 meeting in Washington, D.C. considered proposed amendments to several Rules. It recommends that the following amendments be approved for publication and comment from the bench and bar. Copies of the proposed amendments and the proposed Advisory Committee Notes are attached.

B. Rule 5. Exemption of Persons Arrested for Unlawful Flight to Avoid Prosecution.

At the Advisory Committee's October 1992 meeting in Seattle, a subcommittee was tasked with studying possible problems resulting from the requirement that persons arrested for violating 18 U.S.C. § 1073, Unlawful Flight to Avoid Prosecution (UFAP) appear before a magistrate under Rule 5. The subcommittee reported at the April 1993 meeting that its study indicated that several scenarios are possible where state officials may or may not be involved in the arrest of a UFAP defendant and that the Rule 5 requirement of prompt appearance may not be essential where the U.S. attorney has no intent to prosecute. The Committee therefore recommended that Rule 5 be amended to exempt UFAP defendants from Rule 5 where the United States does not intend to prosecute. The proposed Rule and Committee Note are attached. The Advisory Committee recommends that the amendment be published for public comment.

C. Rule 10. In Absentia Arraignments; Use of Video Teleconferencing.

Pursuant to a proposal from the Bureau of Prisons, the Committee considered a proposal to amend Rules 10 and 43 to permit video arraignments at its October 1992 meeting. A subcommittee was appointed and recommended to the Committee at its April 1993 meeting that Rule 10 be amended to provide for video arraignments, where the defendant waives the right to be present in court. Its recommendation was based, in part, on the Judicial Conference's recent approval of a

pilot program in the Eastern District of North Carolina. That program permits use of video conferencing technology to conduct competency hearings between the court and a corrections facility. The Committee contemplates that the Rule will simply permit the court, in its discretion, to use such technology.

The Advisory Committee recommends that the proposed amendment, which is attached, be approved for publication and comment.

D. Rule 43. In Absentia Pretrial Sessions; Use of Video Teleconferencing; In Absentia Sentencing.

The Advisory Committee considered two different amendments to Rule 43. The first focused on use of video teleconferencing for pretrial sessions and the second focused on in absentia sentencing for defendants who become fugitives after their trial has begun.

1. Video Teleconferencing for Pretrial Sessions:

In conjunction with its consideration of an amendment to Rule 10 regarding video arraignments, supra, the Committee also addressed an amendment to Rule 43 which would permit use of video teleconferencing technology for other pretrial sessions, where the defendant waives the right to be present in court. Both rules generated extensive discussion and as with the amendment to Rule 10, the amendment to Rule 43 grants the court the discretion to use video teleconferencing. It does not mandate such use.

The Advisory Committee recommends that this proposed amendment to Rule 43 be approved for publication and public comment.

2. In Absentia Sentencing

The Department of Justice has proposed that Rule 43 be amended to permit in absentia sentencing for defendants who flee after their trial has begun. Currently, Rule 43 permits the trial itself to continue, but makes no specific reference to the ability of the court to continue with sentencing. As the Department of Justice explained, this can create a gridlock on the system. The amendment would make it clear that once the trial has begun, the defendant may not only waive the right to be present at trial but also the right to be present at sentencing.

The Committee recommends that the the Standing

Committee approve this amendment for publication and public comment.

E. Rule 53. Permitting Cameras in Courtroom; Broadcasting of Proceedings.

Pursuant to a request from the American Society of Newspaper Editors and others, the Advisory Committee considered an amendment to Rule 53 which would permit photographs and broadcasting of judicial proceedings, under guidelines adopted by the Judicial Conference. The Committee's discussion focused on the pending report on a three-year pilot program for cameras and audio coverage of civil proceedings, which was approved by the Judicial Conference in 1990. The Committee, following an extended discussion of this proposal, believed that it was appropriate to propose an amendment to Criminal Rule 53 and seek public comment. In making that decision, the Committee considered both the absence of horror stories in those courts which permit photographs and broadcasting and the positive features of such coverage.

Attachments:
GAP Report
Proposed Amendments
Minutes of April 1993 Meeting

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

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

SUBJECT: **GAP Report: Explanation of Changes Made Subsequent to the Circulation for Public Comment of Rules 16, 29, 32 and 40**

DATE: **May 15, 1993**

At its July 1992 meeting the Standing Committee approved the circulation for public comment of proposed amendments to Rules 16 and 29 and at its meeting in December 1992 approved the circulation for public comment of proposed amendments to Rules 32 and 40.

All four rules were published on an expedited basis in January 1993 with a deadline of April 15, 1993 for any comments. At its meeting on April 22, 1993 in Washington, D.C., two 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 two 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 16(a)(1)(A). Production of Statements by Organizational Defendants.

The Committee made a minor change to the rule. As originally published, and as reflected in the original Committee Note, the rule did not address the question of what showing the defense would have to make to demonstrate that the requested statements were made by a person associated with an organizational defendant. After additional discussion on that point, the Committee changed the rule to reflect that the defense is entitled to discover the statements of persons, *whom the government contends*, were in a position to bind an organizational defendant. The Note was also changed to indicate that the rule does not require the defense to stipulate or admit that a particular person was in a position to bind the organization.

2. Rule 29(b). Delayed Ruling on Judgment of Acquittal.

The Committee made no changes to the rule. But it did make a minor change to the Committee Note to reflect that on appeal of a delayed ruling on a motion for judgment of acquittal, the appellate court would also be limited to consideration of the evidence presented before the motion was made.

3. Rule 32. Sentence and Judgment.

In response to public comments on the published version of Rule 32, the Advisory Committee has made several changes to the rule and the Committee Note. The changes, other than minor clarifying changes in wording, are as follows:

Time Limits: In response to a significant number of commentators who expressed concern about codifying a specific time limit for sentencing, the Committee changed Rule 32(a) to retain the current language that sentencing should take place "without unnecessary delay." The rule continues to provide, however, that the internal time limits in Rule 32(b)(6) will be followed unless the court advances or shortens them.

Presence of Counsel: Although most commentators agreed that the defense counsel should be entitled to attend the probation officer's interviews of the defendant, there was concern that providing that right might unnecessarily delay the sentencing process. The Committee agreed and changed subdivision (b)(2) to provide that the defendant's counsel is "entitled to notice and a reasonable opportunity" to attend any interview. In the Note, the Committee indicated that the burden should be on counsel, once notice is given, to respond. The Note was further changed to indicate that the Committee believed that the term "interview" should extend only to communications initiated by the probation officer for the purpose of obtaining information to be used in the presentence report.

Probation Officer's Determination of Applicable Sentencing Classification: A number of commentators expressed concern about language in subdivision (b)(4)(B) which required that the presentence report should contain the sentencing classification which the probation officer "determines" is applicable. Some commentators indicated that that language perpetuates the view that the probation officer determines that appropriate sentence. In

response to that concern the Committee changed the word "determines" to "believes."

Availability of Nonprison Programs: In response to the suggestion of at least one commentator, Rule 32(b)(4)(E) was modified slightly to clarify that information about nonprison programs and resources need not be included in the presentence report except in appropriate cases.

Filing of Original Objections: Several commentators raised the question of whether the court would ever see counsel's original objections to the presentence report, as noted in subdivision (b)(6)(B). Although the Committee made no change in the rule, it did add a comment in the Note to indicate that nothing in the rule prohibits the court from requiring the parties to file their objections with the court or have them included in full as a part of the addendum to the presentence report.

Probation Officer's Authority to Require Meeting: As published, subdivision (b)(6)(B) authorized the probation officer to require the parties to meet and discuss their objections to the presentence report. In response to comments that that provision might create incorrect perceptions about the probation officer's role in sentencing, the Committee modified the language to indicate that the probation officer may meet with the parties to discuss their objections.

Additional Evidence at Sentencing Hearing: In subdivision (c)(1) the Committee modified the language addressing the court's discretion to permit the parties to present additional information at the sentencing hearing; in lieu of the words "to introduce testimony or other evidence on the objections," the Committee changed the rule to read, "to introduce evidence," thus leaving it to the court to decide in its discretion if the offered evidence, in whatever form, should be admitted. The Committee Note was expanded slightly to recognize that in appropriate cases, due process might require the court to hear the offered evidence.

Disclosure of Information Not Included in the Presentence Report: The Committee modified subdivision (c)(3)(A) to provide that if the court had received information which has been excluded from the presentence report under (b)(5) because it is confidential, etc., the court must prepare a written summary of that information and provide it to the

parties -- if the court intends to rely on the information in sentencing. As originally published (and as it exists currently in Rule 32) the court had the option of summarizing that information orally or in writing. The language was also modified slightly to require the court to give the defense a reasonable opportunity to comment on the information. The Committee Note was amended to indicate that the reasonable opportunity requirement might necessitate a continuance.

Notification of Right to Appeal: The language in subdivision (c)(5) was changed to reflect the differences in the right to appeal, depending on whether the defendant has entered a guilty or not guilty plea.

4. Rule 40(d). Conditional Release of Probationer.

The Committee received no written comments addressing the proposed change to Rule 40(d) and has made no changes in the proposed language of the rule or the Committee Note.

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

Rule 16. Discovery and Inspection

(a) DISCLOSURE OF EVIDENCE BY THE GOVERNMENT.

(1) Information Subject to Disclosure.

(A) STATEMENT OF DEFENDANT. Upon request of a defendant the government must ~~shall~~ disclose to the defendant and make available for inspection, copying or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. The government must ~~shall~~ also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial. Upon request of a ~~Where the~~ defendant which is an

organization such as a corporation, partnership, association, or labor union, the government must disclose to the defendant any of the foregoing statements made by a person ~~the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury~~ who the Government contends (1) was, at the time of making the statement ~~that testimony~~, so situated as a ~~an~~ director, officer, ~~or~~ employee, or agent as to have been able legally to bind the defendant in respect to the subject of the statement ~~conduct constituting the~~ offense, or (2) was, at the time of offense, personally involved in the alleged conduct constituting the offense and so situated as a ~~an~~ director, officer, ~~or~~ employee, or agent as to have been able legally to bind the defendant in respect to that alleged conduct in which the ~~witness~~ person was involved.

* * * * *

COMMITTEE NOTE

The amendment is intended to clarify that the discovery and disclosure requirements of the rule apply equally to individual and organizational defendants. See In re United States, 918 F.2d 138 (11th Cir. 1990)(rejecting distinction between individual and organizational defendants). Because an organizational defendant may not know what its officers or agents have said or done in regard to a charged offense,

it is important that it have access to statements made by persons whose statements or actions could be binding on the defendant. See also United States v. Hughes, 413 F.2d 1244, 1251-52 (5th Cir. 1969), vacated as moot, 397 U.S. 93 (1970)(prosecution of corporations "often resembles the most complex civil cases, necessitating a vigorous probing of the mass of detailed facts to seek out the truth").

The amendment defines defendant in a broad, nonexclusive, fashion. See also 18 U.S.C. § 18 (the term "organization" includes a person other than an individual). And the amendment recognizes that an organizational defendant could be bound by an agent's statement, see, e.g., Federal Rule of Evidence 801(d)(2), or be vicariously liable for an agent's actions. The amendment contemplates that, upon request of the defendant, the Government will disclose any statements within the purview of the rule and made by persons whom the government contends to be among the classes of persons described in the rule. There is no requirement that the defense stipulate or admit that such persons were in a position to bind the defendant.

ADVISORY COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 16(a)(1)(A)

I. SUMMARY OF COMMENTS: Rule 16(a)(1)(A)

The Committee has received three written (3) comments on the proposed amendment to Rule 16(a)(1)(A)(statements by organizational defendants). All three commentators support the amendment but focus on the issue of what showing, if any, the defendant organization must make in order to obtain disclosure. One suggests a change in the Committee Note to the effect that the organizational defendant should not be required to show that an individual was able to legally bind the defendant. Another advocates an automatic disclosure provision. And the third indicates that the disclosure should also extend to those who the government contends were in a position to bind the defendant organization.

II. LIST OF COMMENTATORS: Rule 16(a)(1)(A)

1. David P. Bancroft, Esq.,San Francisco, CA, 4-2-93

2. William J. Genego & Peter Goldberger, NADCL, Wash., D.C., 4-14-93.

3. Myrna Raeder, Prof., Los Angeles, CA, 4-12-93.

III. COMMENTS: Rule 16(a)(1)(A)

David P. Bancroft, Esq.
Private Practice
San Francisco, CA,
April 2, 1993

Mr. Bancroft states that the reference in the Committee Note to the process of showing that a particular individual had the ability to bind the organizational defendant is not practical; an entity often does not know which agents the government believes can bind it. He advocates an automatic disclosure provision -- based on the government's claim that an individual was in a position to bind the entity.

Advisory Committee on Criminal Rules
Proposed Amendments to Rule 16(a)(1)(A)
May 1993

William J. Genego, Esq.
Peter Goldberger, Esq.
National Assoc. of Crim. Defense Lawyers
Washington, D.C.
April 14, 1993

Mr. Genego and Mr. Goldberger, on behalf of the National Association of Criminal Defense Lawyers, endorses the amendment to Rule 16. But they suggest that the rule be further modified to require disclosure for statements by persons who the government contends were in a position to bind the defendant organization. They note that in some cases the organization may disclaim that the person was in such a position but the government will take the opposite position; the entity, they suggest, should be able to obtain the statement even if it disagrees with the government's position.

Myrna Raeder
Professor of Law
Southwestern Univ. School of Law
Los Angeles, CA
April 12, 1993

Professor Raeder, on behalf of the American Bar Association, supports the amendment to Rule 16, noting that in February 1992, the ABA approved a similar amendment. She believes, however, that the Committee Note should be changed to reflect what, if any, burden. might rest on the organizational defendant to show that the requested statements were made by a person able to bind the organization. The Note as currently written does not specifically address that question but instead leaves it for the court and the parties to determine that issue. Professor Raeder indicates that the comment is entirely too ambiguous to ensure that organizational defendants will routinely receive the statements. She recommends that the Note reflect that upon request, the government should routinely produce statements and testimony of individuals who it may contend at trial bind the organizational defendant. This change, she suggests would be simple to apply and avoid interpretive issues.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 29. Motion for Judgment of Acquittal

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(b) RESERVATION OF DECISION ON MOTION. ~~If a motion for judgment of acquittal is made at the close of all the evidence,~~ The court may reserve decision on ~~the~~ a motion for judgment of acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

COMMITTEE NOTE

The amendment permits the reservation of a motion for a judgment of acquittal made at the close of the government's case in the same manner as the rule now permits for motions made at the close of all of the evidence. Although the rule as written did not permit the court to reserve such motions made at the end of the government's case, trial courts on occasion have nonetheless reserved ruling. See, e.g., United States v. Bruno, 873 F.2d 555 (2d Cir.), cert. denied, 110 S.Ct. 125 (1989); United States v. Reifsteck, 841 F.2d 701 (6th Cir. 1988). While the amendment will not affect a large number of cases, it should remove the dilemma in those close cases in which the court would feel pressured into making an immediate, and possibly erroneous, decision or violating the rule as presently written by reserving its ruling on the motion.

The amendment also permits the trial court to balance the defendant's interest in an immediate resolution of the motion against the interest of the government in proceeding to a verdict thereby preserving its right to appeal in the event a verdict of guilty is returned but is then set aside by the granting of a judgment of acquittal. Under the double jeopardy clause the government may appeal the granting of a motion for judgment of acquittal only if there would be no necessity for another trial, i.e., only where the jury has returned a verdict of guilty. United States v. Martin Linen Supply Co., 430 U.S. 564 (1977). Thus, the government's right to appeal a rule 29 motion is only preserved where the ruling is reserved until after the verdict.

In addressing the issue of preserving the government's right to appeal and at the same time recognizing double jeopardy concerns, the Supreme Court observed:

> We should point out that it is entirely possible for a trial court to reconcile the public interest in the Government's right to appeal from an erroneous conclusion of law with the defendant's interest in avoiding a second prosecution. In United States v. Wilson, 420 U.S. 332 (1975), the court permitted the case to go to the jury, which returned a verdict of guilty, but it subsequently dismissed the indictment for preindictment delay on the basis of evidence adduced at trial. Most recently in United States v. Ceccolini, 435 U.S. 168 (1978), we described similar action with approval: "The District Court had sensibly made its finding on the factual question of guilt or innocence, and then ruled on the motion to suppress; a reversal of these rulings would require no further proceeding in the District Court, but merely a reinstatement of the finding of guilt." Id. at 271.

United States v. Scott, 437 U.S. 82, 100 n. 13 (1978). By analogy, reserving a ruling on a motion for judgment of acquittal strikes the same balance as that reflected by the Supreme Court in Scott.

Reserving a ruling on a motion made at the end of the government's case does pose problems, however, where the defense decides to present evidence and run the risk that such evidence will support the government's case. To address that problem, the amendment provides that the trial

court is to consider only the evidence submitted at the time of the motion in making its ruling, whenever made. And in reviewing a trial court's ruling, the appellate court would be similarly limited.

ADVISORY COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 29

I. SUMMARY OF COMMENTS: Rule 29

The Committee has received two comments on the proposed amendment to Rule 29. One comment merely welcomes the amendment which would make it clear that the court's decision on a reserved motion must be based on the evidence introduced prior to the motion. The other comment suggests that either the Rule itself or the Committee Note contain a notation that the "waiver rule" does not apply; that rule indicates that if a defendant presents evidence after denial of a judgment of acquittal at the close of the government's case, he waives his objection to the denial.

II. LIST OF COMMENTATORS: Rule 29

1. William J. Genego & Peter Goldberger, NADCL, Wash., D.C., 4-14-93.

2. Robert L. Weinberg, Esq., Washington, D.C., 4-14-93.

III. COMMENTS: Rule 29

William J. Genego, Esq.
Peter Goldberger, Esq.
National Assoc. of Crim. Defense Lawyers
Washington, D.C.
April 14, 1993

Mr. Genego and Mr. Goldberger, on behalf of the NADCL, endorse the amendment which makes it clear that a court's reserved ruling may be based only the evidence introduced prior to the motion for judgment of acquittal.

Mr. Robert L. Weinberg, Esq.
Private Practice
Washington, D.C.
April 14, 1993

Mr. Weinberg discusses the "waiver rule" which has been adopted by all of the circuits. That rule provides that if a defendant proceeds with his case after an unsuccessful motion for a judgment of acquittal following the government's case-in-chief, he has waived his objection to the denial of his motion and the court may consider all of

the evidence presented at trial. Mr. Weinberg suggests that either the amendment or the Committee Note should be amended to indicate that the waiver rule will not apply where the ruling is reserved. Where the trial court reserves ruling on a Rule 29 motion, the defendant would not have chosen to proceed after knowing that the government's case was sufficient. Any appellate ruling on the motion, according to the rule as proposed, will be based on the evidence as it stood at the close of the government's case; thus the appellate review is not focused on all of the evidence at the close of the trial, as it is when the defendant proceeds with his case following a denial. Thus, he recommends that the Committee specifically address the point that on appeal, by either side, the appellate court may only consider the evidence as it existed at the time of the motion.

[Rule 32 is deleted and replaced with the following]

Rule 32. Sentence and Judgment

(a) IN GENERAL; TIME FOR SENTENCING.
When a presentence investigation and report are made under subdivision (b)(1), sentence should be imposed without unnecessary delay following completion of the process prescribed by subdivision (b)(6). The time limits prescribed in subdivision (b)(6) may be either advanced or continued for good cause.

(b) PRESENTENCE INVESTIGATION AND REPORT.

(1) *When Made.* The probation officer shall make a presentence investigation and submit a report to the court before the sentence is imposed, unless:

(A) the court finds that the information in the record enables it to exercise its sentencing authority meaningfully under 18 U.S.C. 3553; and

(B) the court explains this finding on the record.

(2) *Presence of Counsel.* On request, the defendant's counsel is entitled to notice and a reasonable opportunity to attend any interview of the defendant by a probation officer in the course of a presentence investigation.

(3) *Nondisclosure.* The report must not be submitted to the court or its contents disclosed to anyone unless the defendant has consented in writing, has pleaded guilty or nolo contendere, or has been found guilty.

(4) *Contents of the Presentence Report.* The presentence report must contain --

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

(B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission under 28 U.S.C. 994(a), as the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission under 28 U.S.C. 994 (a)(1); and the probation officer's explanation of any factors that may suggest a different sentence -- within or without the applicable guideline -- that would be more appropriate, given all the circumstances;

(C) a reference to any pertinent policy statement issued by the

Sentencing Commission under 28 U.S.C. 994(a)(2);

(D) verified information, stated in a nonargumentative style, containing an assessment of the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;

(E) in appropriate cases, information about the nature and extent of nonprison programs and resources available for the defendant;

(F) any report and recommendation resulting from a study ordered by the court under 18 U.S.C. 3552(b); and

(G) any other information required by the court.

(5) Exclusions. The presentence report must exclude:

(A) any diagnostic opinions that, if disclosed, might seriously disrupt a program of rehabilitation;

(B) sources of information obtained upon a promise of confidentiality; or

(C) any other information that, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons.

(6) Disclosure and Objections.

(A) Not less than 35 days before the sentencing hearing -- unless the defendant waives this minimum period -- the probation officer shall furnish the presentence report to the defendant, the defendant's counsel, and the attorney for the Government. The court may, by local rule or in individual cases, direct the probation officer, in disclosing the presentence report, to

withhold the probation officer's recommendation, if any, on the sentence.

(B) Within 14 days after receiving the presentence report, the parties shall communicate in writing to the probation officer, and to each other, any objections to any material information, sentencing classifications, sentencing guideline ranges, and policy statements contained in or omitted from the presentence report. After receiving objections, the probation officer may meet with the defendant, the defendant's counsel, and the attorney for the Government to discuss those objections. The probation officer may also conduct a further investigation and revise the presentence report as appropriate.

(C) Not later than 7 days before the sentencing hearing, the probation officer shall submit the presentence

report to the court, together with an addendum setting forth any unresolved objections, the grounds for those objections, and the probation officer's comments on the objections. At the same time, the probation officer shall furnish the revisions of the presentence report and the addendum to the defendant, the defendant's counsel, and the attorney for the Government.

(D) Except for any unresolved objection under subdivision (b)(6)(B), the court may, at the sentencing hearing, accept the presentence report as its findings of fact. For good cause shown, the court may allow a new objection to be raised at any time before imposing sentence.

(c) SENTENCE

(1) *Sentencing Hearing*. At the sentencing hearing, the court shall afford

counsel for the defendant and for the Government an opportunity to comment on the probation officer's determinations and on other matters relating to the appropriate sentence, and shall rule on any unresolved objections to the presentence report. The court may, in its discretion, permit the parties to introduce evidence on the objections. For each matter controverted, the court shall make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing. A written record of these findings and determinations must be appended to any copy of the presentence report made available to the Bureau of Prisons.

(2) *Production of Statements at Sentencing Hearing.* Rule 26.2(a)-(d), (f) applies at a sentencing hearing under this

rule. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the movant, the court may not consider the affidavit or testimony of the witness whose statement is withheld.

(3) *Imposition of Sentence.* Before imposing sentence, the court shall:

(A) verify that the defendant and defendant's counsel have read and discussed the presentence report made available under subdivision (b)(6)(A). If the court has received information excluded from the presentence report under subdivision (b)(5) the court -- in lieu of making that information available -- shall summarize it in writing, if the information will be relied on in determining sentence. The court shall also give the defendant and the defendant's counsel a reasonable

opportunity to comment on that information.

(B) afford defendant's counsel an opportunity to speak on behalf of the defendant;

(C) address the defendant personally and determine whether the defendant wishes to make a statement and to present any information in mitigation of the sentence; and

(D) afford the attorney for the Government an equivalent opportunity to speak to the court.

(4) *In Camera Proceedings*. The court's summary of information under subdivision (c)(3)(A) may be in camera. Upon joint motion by the defendant and by the attorney for the Government, the court may hear in camera the statements -- made under subdivision (c)(3)(B), (C), and (D) -- by the

defendant, the defendant's counsel, or the attorney for the Government.

(5) *Notification of Right to Appeal.* After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the right to appeal. After imposing sentence in any case, the court shall advise the defendant of any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. If the defendant so requests, the clerk of the court shall immediately prepare and file a notice of appeal on behalf of the defendant.

(d) JUDGMENT.

(1) *In General.* A judgment of conviction must set forth the plea, the verdict or findings, the adjudication, and the sentence. If the defendant is found not guilty or for any other reason is entitled to

be discharged, judgment must be entered accordingly. The judgment must be signed by the judge and entered by the clerk.

(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.

(e) PLEA WITHDRAWAL. If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. 2255.

COMMITTEE NOTE

The amendments to Rule 32 are intended to accomplish two primary objectives. First, the amendments incorporate elements of a "Model Local Rule for Guideline Sentencing" which was proposed by the Judicial Conference Committee on Probation Administration in 1987. That model rule, and the accompanying report, were prepared to assist trial judges in implementing guideline sentencing mandated by the Sentencing Reform Act of

1984. See Committee on the Admin. of the Probation Sys., Judicial Conference of the U.S., Recommended Procedures for Guideline Sentencing and Commentary: Model Local Rule for Guideline Sentencing, Reprinted in T. Hutchinson & D. Yellen, Federal Sentencing Law and Practice, app. 8, at 431 (1989). It was anticipated that sentencing hearings would become more complex due to the new fact finding requirements imposed by guideline sentencing methodology. See U.S.S.G. 6A1.2. Accordingly, the model rule focused on preparation of the presentence report as a means of identifying and narrowing the issues to be decided at the sentencing hearing.

Second, in the process of effecting those amendments, the rule was reorganized. Over time, numerous amendments to the rule had created a sort of hodge podge; the reorganization represents an attempt to reflect an appropriate sequential order in the sentencing procedures.

Subdivision (a). Subdivision (a) retains the general mandate that sentence be imposed without unnecessary delay thereby permitting the court to regulate the time to be allowed for the probation officer to complete the presentence investigation and submit the report. The only requirement is that sufficient time be allowed for completion of the process prescribed by subdivision (b)(6) unless the time periods established in that subdivision are shortened or lengthened by the court for good cause. Such limits are not intended to create any new substantive rights for the defendant or the Government which would entitle either to relief if a time limit prescribed in the rule is not kept.

The remainder of subdivision (a), which addressed the sentencing hearing, is now located in subdivision (c).

Subdivision (b). Subdivision (b) (formerly subdivision (c)) which addresses the presentence investigation, has been modified in several respects.

First, subdivision (b)(2) is a new provision which provides that, on request, defense counsel is entitled to notice and a reasonable opportunity to be present at any interview of the defendant conducted by the probation officer. Although the

courts have not held that presentence interviews are a critical stage of the trial for purposes of the Sixth Amendment right to counsel, the amendment reflects case law which has indicated that requests for counsel to be present should be honored. See, e.g., United States v. Herrera-Figureroa, 918 F.2d 1430, 1437 (9th Cir. 1990)(court relied on its supervisory power to hold that probation officers must honor request for counsel's presence); United States v. Tisdale, 952 F.2d 934, 940 (6th Cir. 1992)(court agreed with rule requiring probation officers to honor defendant's request for attorney or request from attorney not to interview defendant in absence of counsel). The Committee believes that permitting counsel to be present during such interviews may avoid unnecessary misunderstandings between the probation officer and the defendant. The rule does not further define the term "interview." The Committee intended for the provision to apply to any communication initiated by the probation officer for the purpose of obtaining information from the defendant which will be used in preparation of the presentence report. Spontaneous or unplanned encounters between the defendant and the probation officer would normally not fall within the purview of the rule. The Committee also believed that the burden should rest on defense counsel, having received notice, to respond as promptly as possible to enable timely completion of the presentence report.

Subdivision (b)(6), formerly (c)(3), includes several changes which recognize the key role the presentence report is playing under guideline sentencing. The major thrust of these changes is to address the problem of resolving objections by the parties to the probation officer's presentence report. Subdivision (b)(6)(A) now provides that the probation officer must present the presentence report to the parties not later than 35 days before the sentencing hearing (rather than 10 days before imposition of the sentence) in order to provide some additional time to the parties and the probation officer to attempt to resolve objections to the report. There has been a slight change in the practice of deleting from the copy of the report given to the parties certain information specified in (b)(6)(A). Under that new provision (formerly subdivision (c)(3)(A)), the court now has the discretion (in an individual case or in accordance with a local rule) to decide whether to direct the probation officer to disclose any final recommendation concerning the

officer to disclose any final recommendation concerning the sentence. But the prior practice of not disclosing confidential information, or other information which might result in harm to the defendant or other persons, is retained in (b)(5).

New subdivisions (b)(6)(B), (C), and (D) now provide explicit deadlines and guidance on resolving disputes about the contents of the presentence report. The amendments are intended to provide early resolution of such disputes by (1) requiring the parties to provide the probation officer with written objections to the report within 14 days of receiving the report; (2) permitting the probation officer to meet with the defendant, the defendant's counsel, and the attorney for the Government to discuss objections to the report, conduct an additional investigation, and to make revisions to the report as deemed appropriate; (3) requiring the probation officer to submit the report to the court and the parties not later than 7 days before the sentencing hearing, noting any unresolved disputes; and (4) permitting the court to treat the report as its findings of fact, except for the parties' unresolved objections. Although the rule does not explicitly address the question of whether counsel's objections to the report are to be filed with the court, there is nothing in the rule which would prohibit a court from permitting, or requiring, the parties to file their objections or have them included in full as a part of the addendum to the presentence report.

This procedure, which generally mirrors the approach in the Model Local Rule for Guideline Sentencing, supra, is intended to maximize judicial economy by providing for more orderly sentencing hearings while also providing fair opportunity for both parties to review, object to, and comment upon, the probation officer's report in advance of the sentencing hearing. Under the amendment, the parties would still be free at the sentencing hearing to comment on the presentence report, and in the discretion of the court, to introduce evidence concerning their objections to the report.

Subdivision (c). Subdivision (c) addresses the imposition of sentence and makes no major changes in current practice. The provision consists largely of material formerly located in subdivision (a). Language formerly in (a)(1) referring to the

court's disclosure to the parties of the probation officer's determination of the sentencing classifications and sentencing guideline range is now located in subdivisions (b)(4)(B) and (c)(1). Likewise, the brief reference in former (a)(1) to the ability of the parties to comment on the probation officer's determination of sentencing classifications and sentencing guideline range is now located in (c)(1) and (c)(3).

Subdivision (c)(1) is not intended to require that resolution of objections and imposition of the sentence necessarily occur at the same time or during the same hearing. It requires only that the court rule on any objections before sentence is imposed. In considering objections during the sentencing hearing, the court may in its discretion, permit the parties to introduce evidence. The rule speaks in terms of the court's discretion, but the Sentencing Guidelines specifically state that the court must provide the parties with a reasonable opportunity to offer information concerning a sentencing factor reasonably in dispute. *See* U.S.S.G. § 6A1.3(a). Thus, it may be an abuse of discretion not to permit the introduction of additional evidence. Although the rules of evidence do not apply to sentencing proceedings, *see* Fed. R. Evid. 1101(d)(3), the court clearly has discretion in determining the mode, timing, and extent of the evidence offered. *See, e.g.*, United States v. Zuleta-Alvarez, 922 F.2d 33, 36 (1st Cir. 1990)(trial court did not err in denying defendant's late request to introduce rebuttal evidence by way of cross-examination).

Subdivision (c)(1) (formerly subdivision (c)(3)(D)) indicates that the court need not resolve controverted matters which will "not be taken into account in, or will not affect, sentencing." The words "will not affect" did not exist in the former provision but were added in the revision in recognition that there might be situations, due to overlaps in the sentencing ranges, where a controverted matter would not alter the sentence even if the sentencing range were changed.

The provision for disclosure of a witness' statements, which was recently proposed as an amendment to Rule 32 as new subdivision (e), is now located in subdivision (c)(2).

Subdivision (c)(3) includes a minor change. First, if the court intends to rely on information otherwise excluded from the presentence report under subdivision (b)(5), that information is to be summarized in writing and submitted to the parties. Under the former provision in (c)(3)(A), such information could be summarized orally. Once the information is presented, the defendant and the defendant's counsel are to be given a reasonable opportunity to comment; in appropriate cases, that may require a continuance of the sentencing proceedings.

Subdivision (d). Subdivision (d), dealing with entry of the court's judgment, is former subdivision (b).

Subdivision (e). Subdivision (e), which addresses the topic of withdrawing pleas, was formerly subdivision (d). Both provisions remain the same except for minor stylistic changes.

Under present practice, the court may permit, but is not required to hear, victim allocution before imposing sentence. The Committee considered, but rejected, a provision which would have required the court to permit victim allocution at sentencing. Although the Committee was sensitive to the interest of some victims in the sentence to be imposed, it also recognized a number of difficulties which the Committee ultimately concluded outweighed any value to the victim in personally addressing the court. First, under guideline sentencing (which takes victim impact into account), the court has very limited sentencing discretion once the applicable guideline range has been determined, and the guideline range is usually below the maximum sentence allowed by statute. In most cases, therefore, the views of the victim would have little or no impact upon the sentence thereby producing a likelihood of victim frustration rather than victim satisfaction. Additionally, if the victim's allocution persuaded the court to consider a possible departure from the guideline sentencing range, due process might require notice and an opportunity to contest that result under Burns v. United States, ___ U.S. ___, 111 S.Ct. 2182 (1991). This could substantially complicate and delay the sentencing hearing. There is also a problem in the federal system in identifying victims who would have the right to allocution. While a single victim of a violent crime is easily identified, federal criminal law covers

a broad range of violent as well as non-violent conduct which often results in numerous victims. In such cases, it simply would not be feasible to extend the right of allocution to all of the victims. Finally, the Committee also took into account existing law and procedure which keeps victims informed of the progress of the case, *see, e.g.*, 42 U.S.C. 10601, et seq. (enumerated "victims' rights include, inter alia, the right to be notified of court proceedings, the right to be present at all public court proceedings, and the right to confer with the attorney for the Government) and Rule 32 itself which provides an opportunity for direct input in the preparation of the presentence report. *See* Rule (b)(4)(D).

ADVISORY COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 32

I. SUMMARY OF COMMENTS: Rule 32

The Advisory Committee received twenty-nine (29) written comments and heard the testimony of two (2) witnesses on the proposed amendments to Rule 32. Approximately one-half of the comments were filed by Probation Officers and most of the remainder were filed by judges. Almost all of the commentators were very critical of the 70-day time limit for imposing sentence in Rule 32(a). Many of those favored retention of the more generalized language in Rule 32 as it currently exists. While several were also critical of the internal time limits for completing certain tasks incident to preparation of the Presentence Report, at least one favored the internal time limits.

Approximately one-third of the commentators expressed concern for potential delays in requiring counsel's presence at any presentence interview with the defendant in (b)(2); several recommended that the right for counsel to be present not be absolute, but instead be conditioned on counsel's reasonable availability. At least one was strongly opposed to providing the right for counsel to even be present.

Several commentators recognized the debate over whether the probation officer's recommendation regarding a sentence should remain confidential. They recommended that the presumption of confidentiality should prevail rather than the proposed amendment which reflects the opposite presumption. See proposed Rule 32(b)(6)(A).

Several comments addressed concerns about extending Rule 26.2 (disclosure of witness statements) to the sentencing proceeding. There was particular concern that the probation officer's files would be subject to disclosure. It should be noted that that particular provision has already been approved by the Supreme Court and would become part of Rule 32 even if no other amendments were made.

Additional comments addressed: the potential interplay with the computation of time in Rule 45(a); whether the court has discretion to hear additional evidence at sentencing; whether there is any need to nationalize what is now local practice in approximately one-half of the courts; who has the burden of proof on controverted matters; the need for the court to see counsel's objections to the PSR; whether the provision concerning disclosure of the reasons

for the sentence in the judgment itself; and counsel's ability to make last minute objections to the PSR. There were also a number of comments on minor technical changes or corrections.

II. LIST OF COMMENTATORS: Rule 32

1. Rudi M. Brewster, Judge, San Diego, CA, 3-18-93.
2. Vincent L. Broderick & Mark L. Wolf, Judges, White Plains, N.Y., 4-14-93
3. Leonard J. Bronec, Prob. Off., Kansas City, Kan. 2-11-93.
4. Loren A. N. Buddress, Prob. Off., San Francisco, CA, 3-19-93.
5. Avern Cohn, Judge, Detroit, Mich., 4-2-93.
6. Julian Able Cook, Jr., Judge, Detroit, Mich., 3-19-93.
7. J. Robert Cooper, Esq., Atlanta, Ga., 2-4-93.
8. Barbara B. Crabb, Judge, Madison, Wisc., 2-2-93
9. Joseph P. Donohue, Prob. Off., Scranton, PA., 4-9-93.
10. James W. Duckett, Jr., Prob. Off., Columbia, S.C., 2-2- 93.
11. William J. Genego & Peter Goldberger, Esq., NACDL, Wash, D.C., 4-15-93.
12. T.A. Hummel, Prob. Off., Boise, Idaho, 2-2-93.
13. George P. Kazen, Judge, Laredo, Tex., 2-18-93.
14. Sim Lake, Judge, Houston, Tex., 2-24-93.
15. Robert B. Lee, Prob. Off., Seattle, Wash., 3-23-93.
16. Robert P. Longshore, Prob. Off., Montgomery, Ala., 2-10-93.

17. Robert M. Latta, Prob. Off., Los Angeles, CA, 2-16-93.

18. Thomas E. McKemey, Prob. Off., Philadelphia, Pa. 4-15-93.

19. Allen L. Noble, Prob. Off., Little Rock, Ark. 3-24-93.

20. Justin L. Quakenbush, Judge, Spokane, Wash., 2-2-93.

21. John D. Rainey, Judge, Houston, Tex., 3-22-93.

22. Lamont Ramage, Prob. Off., Austin, Tex., 2-11-93.

23. David F. Sanders, Prob. Off., Las Vegas, Nev., 2-8-93.

24. Frederick N. Smalkin, Judge, Baltimore, Md., 4-7-93.

25. Alan T. Solinsky, Prob. Off., Spokane, Wash., 4-16-93.

26. Joseph B. Steelman, Jr., Prob. Off., Winston-Salem, N.C., 4-13-93.

27. Thomas K. Tarr, Prob. Off., Concord, N.H., 4-2-93.

28. Charlie E. Vernon, Prob. Off., Sacramento, Cal., 2-4-93.

29. G. Wray Ware, Prob. Off., Roanoke, Va., 2-19-93.

III. LIST OF WITNESSES PRESENTING TESTIMONY: Rule 32

1. Thomas W. Hillier, Esq., Seattle, Wash., Testimony Before the Committee, 4-22-93.

2. Frederick N. Smalkin, Judge, Baltimore, Md., Testimony Before Committee, 4-22-93.

IV. COMMENTS: Rule 32

Hon. Rudi M. Brewster
U.S. Dist. Court
San Diego, California
March 18, 1993

Speaking on behalf of the Districts Guidelines Sentencing Committee, Judge Brewster requests that the outer time limits b increased to 84 days; their current practice is to set 77 days if conviction or plea occurs on a Monday, or 77 days from the Monday following a plea or conviction. Second, he recommends deletion of a requirement that the probation officer require a meeting with counsel. That matter should be left to the judge. He attached a copy of General Order 350 which shows their court's procedures along with a time chart for completing certain actions.

Hon. Vincent L. Broderick
Hon. Mark L. Wolf
Committee on Criminal Law, Jud. Conference
White Plains, N.Y.
Feb. 14, 1993

Judges Broderick and Wolf, on behalf of the Judicial Conference Committee on Criminal Law and its subcommittee on Sentencing Procedures, express several concerns about the proposed amendments to Rule 32. While it supports the stylistic reorganization of the rule, it believes that the changes will affect the work of the judges and probation officers. First, the Committee questions the wisdom of adopting strict time limits; citing a recent study by the Federal Judicial Center, the Committee believes that given the need for additional time to develop the PSR, the time limits will be routinely expanded, thus reducing the effectiveness of the rule. Second, the Committee believes that the procedures for dealing with objections to the PSR should remain a matter of local control; to that end they recommend a delay in amending Rule 32 until the FJC completes an empirical study of sentencing procedures. Third, the Committee believes that the provision regarding disclosure of statements should not be extended to probation officers. Fourth, noting that the Criminal Law Committee was sharply divided on the issue of confidentiality of the sentencing recommendation, it recommends that the rule be amended to presume confidentiality, rather than the reverse. Fifth, they recommend that an ambiguity in (b)(4)(B) be clarified; it is not clear just what the probation officer is to recommend concerning a different sentence within or

without the applicable guideline. Sixth, the commentators are concerned that the provision for the presence of counsel at interviews with probation officers may unduly delay the procedures; they suggest that either the Rule or the Committee Note make provision for counsel making themselves reasonably available for the interviews. Seventh, proposed subdivision (c)(1) indicates that the trial court may hear additional evidence; the commentators suggest applicable caselaw may require the court to hear such evidence. Finally, the commentators indicate that the reorganization of Rule 32 is a significant improvement; but they still recommend that most of the major revisions be deleted or delayed.

Leonard J. Bronec
Chief Probation Officer
Kansas City, Kansas
Feb. 11, 1993.

Mr. Bronec believes that Rule 32, as it currently exists is fine and that there is no need to amend it. He also questions the need to incorporate a model local rule into a national standard. He also expresses concerns about the provision dealing with disclosure of statements at sentencing hearings; he would oppose any amendment which would require disclosure of his investigative file. Secondly, he raises concern about the confidentiality of the PSR and opposes any amendment which would permit disclosure of his recommendations. He indicates that the Rule can be reorganized by simply moving around some of the provisions without including controversial amendments. He recommends that Rule 32 not be amended.

Loren A. N. Buddress
Chief Probation Officer
San Francisco, California
March 19, 1993

Citing statistical data concerning the amount of time needed to prepare a PSR, Ms. Buddress recommends deletion of the 70-day limit and a 35-day limit. She also notes the difficulties caused by scheduling interviews where defense counsel is not readily available. She notes that it is not unusual for a delay of 10 days to occur due to that problem.

Hon. Avern Cohn
U.S. Dist. Court
Detroit, Mich.

March 24, 1993

Judge Cohn endorses the view of Judge Cook, infra, that no change should be made in current Rule 32 regarding the role of the probation officer in computing the sentencing guideline.

Hon. Julian Able Cook, Jr.
Chief Judge, U.S. Dist. Court
Detroit, Michigan
March 19, 1993

Judge Cook offers the consensus opinions of the judges in his district. They are concerned about the 70-day limit in light of the diminished staffing available and other problems associated with the PSR. He also notes their reservations about requirement that counsel be present whenever the probation officer interviews the defendant. Although they have no problem with the requirement itself, they believe that it should be made clear that the court and the probation department retain scheduling authority. Finally, he notes the change in language concerning the probation officer's belief as to the applicable guideline range; it is imperative, he says, that the probation officer's calculation is only a recommendation to the judge who must determine the range.

J. Robert Cooper
Private Practice
Atlanta, Georgia
Feb. 4, 1993

Mr. Cooper, who limits his practice to "post-conviction" issues, suggests that the rule address the question of who has the burden of proof in going forward with offers of proof on controverted issues. Secondly, he recommends that the Committee address the issue of who has the authority to release the PSI.

Hon. Barbara B. Crabb
U.S. Dist. Court
Madison, Wisc.
Feb. 2, 1993

On behalf of the Committee on Criminal Rules for the Western District of Wisconsin, Judge Crabb believes the 70-day limit is too long. Although the Committee has no objection to the 10-day limit for review by counsel, it does object to the 14-day and 7-day limits. Secondly, the

Committee believes that the court should see drafts of the PSR as well as the objections presented by counsel; there is apparently some concern that what the court ultimately sees is only the probation officer's summary of the objections. Finally, the Committee questions the wisdom of filling the PSR with information about nonprison programs when the defendant is to be sentenced to 10 years or more.

Joseph P. Donohue
Chief Probation Officer
Scranton, PA.,
April 9, 1993

Mr. Donohue briefly expresses concern concerning the 70-day time limit and attaches a copy of his court's policy on guideline sentencing which details certain time limits and procedures.

James W. Duckett, Jr.
Chief Probation Officer
Columbia, S.C.
Feb. 2, 1993

Mr. Duckett expresses deep concern about the 70-day limit and encourages the Committee to retain the "without unnecessary delay" language and delete the other specific time limits as well.

Mr. William J. Genego, Esq.
Mr. Peter Goldberger, Esq.
National Assoc. of Criminal Defense Lawyers
Washington, D.C.
April 14, 1993

The commentators suggest that Rule 32 should not set a national time limit and observe that a court could set a longer time limit under a local rule. They welcome the provision for counsel' presence but question whether the rule should limit the PSR's discussion of the impact of an offense on an individual. They also recommend that the Rule should allow exclusion of the identities of the sources of information only where it appears that disclosure would likely result in harm, etc.; they recommend that (b)(5)(B) be deleted and merged with (b)(5)(C). While not taking a position on whether a probation officer should calculate applicable guidelines, they do express their concern about the proper role of the probation officers. They also take the position re (b)(6)(A) that the reference should be to

the "proposed sentence report" and make it clear that this draft is not to be disclosed to the court. The commentators also indicate that the probation officer should not have the authority to require the parties to meet for discussion of unresolved issues. They also indicate that (c)(1) may be too limited in that the court may wish to hear additional evidence. Additionally, (c)(1) should explicitly require that a copy of the PSR be sent to the Bureau of Prisons whenever confinement is assessed. Finally, the suggest that (c)(3)(A) is out of order and should be in (c)(1) and that in the order of things, the defendant should have the final opportunity to speak at the sentencing hearing.

T.A. Hummel
Chief Probation Officer
Boise, Idaho
Feb. 2, 1993

Mr. Hummel believes the time frames are too rigid. In his district, the courts are on a 45 or 60 day cycle. Given the practice of interviewing defendants twice, the difficulty of arranging counsel's presence, the probation officer should be permitted to prepare the report regardless of counsel's availability. He also notes that inclusion of information about non-prison programs may be useful in some cases but where it is not, it places an undue burden on the court. Finally, he believes that the details of Rule 32 should be left up to local rules.

Hon. George P. Kazen
U.S. Dist. Court
Laredo, Tex.
Feb. 18, 1993.

Judge Kazen strongly urges deletion of the 70-day time limit; he believes that defendants will argue that they have a substantive right to make an issue of it. He notes that in his district, probation officers often have to obtain information from other jurisdictions and that the requirement that the PSR be prepared in 35 days is totally unrealistic; he does indicate agreement with the time limits in (b)(6). He adds that there should be some consideration of adding language in 32(b)(2) that a probation officer may proceed with interviewing the defendant if counsel has not been able comply with a reasonable time limit. Judge Kazen strongly opposes the implied requirement in (b)(6)(A) that the probation officer's recommendation should be disclosed; he believes that more and more officers are opting out of the PSR field because of fear of the courtroom. He also

questions the "realism" of the requirement in (b)(6)(B) that the probation officer may require the defendant and counsel to discuss any unresolved issues. He asks whether the language in (c)(1), "or will not affect sentencing," is intended to change current practice; he notes the increasing problems of correcting minute details in the PSR which may have an impact on choice of facility, parole eligibility, etc. Finally, he questions how Rule 32(c)(2) would work and is concerned that it might limit the Jencks Act.

Robert M. Latta
Probation Officer
Los Angeles, CA
Feb. 16, 1993.

Mr. Latta expresses concern about the 70-day limit; he notes that that rule requires optimum efficiency. He also notes that requiring counsel to be present creates an adversarial process. He adds that requiring production of the PSR 35 days before sentencing has the most dramatic impact on the Probation office. Finally, he indicates that the time frame imposed by the rule has been used in his district and that in some cases the average guideline report takes seven days from dictation to disclosure; that leaves only three and one-half weeks for the entire investigation.

Hon. Sim Lake
U.S. Dist. Court
Houston, Texas
Feb. 24, 1993.

Judge Lake wholeheartedly concurs in the observations made by Judge Kazen, supra.

Robert B. Lee
Chief Probation Officer
Seattle, Wash.
March 23, 1993

Mr. Lee states that the provision in Rule 32(b)(4)(E) concerning information on nonprison programs is often not necessary. He also expresses concern about the adoption of specific time lines; the process might be detailed in Rule 32 but the specific timeliness issues should be left to local rules. Mr. Lee additionally notes that the reference in (b)(6)(C) should be to "revised" PSR's and not revisions. Finally, he believes that some provision should be made for keeping the PSR confidential.

Robert P. Longshore
Chief Probation Officer
Montgomery, Alabama
Feb. 10, 1993.

Mr. Longshore points out that under Rule 45(a), any time limit less than 11 days requires exclusion of weekends, holidays., etc in calculating the deadline. He notes that in a disclosure prior to a weekend with the holiday, the probation officer would have to produce the PSR 11 calender days prior to the scheduled sentencing date. He recommends that the seven day period in Rule 32 be exempted from the Rule 45 computation.

Thomas E. McKemey
Deputy Chief Probation Officer
Philadelphia, Pa.
April 15, 1993

Mr. McKemey expresses objection to the timing requirements in the proposed rule and the provision addressing counsel's presence at any interview with the defendant. While he agrees that counsel should be permitted to attend, he recommends that practical limits be attached; counsel should be made aware of the need to complete the report promptly. He also expressed opposition to the provision which requires disclosure of the probation officer's recommendation re sentence unless a local rule provides otherwise. He believes that that rule will create an inertia for disclosure in all cases. In his view, no changes to the present Rule 32 need to be made.

Allen L. Noble
Deputy Chief Probation Officer
Little Rock, Ark.
March 24, 1993

Mr. Noble recommends that the Committee reconsider the 70-day limit for preparation of the PSR. He notes that in his district they have 78 days and that that is often not enough time. He is concerned that if the 70-day limit is imposed his office will not enough time to prepare a quality PSR.

Hon. Justin L. Quakenbush
Chief Judge, US Dist. Court
Spokane Washington

Feb. 2, 1993

Judge Quakenbush expresses specific concern about the time limit in proposed Rule 32(b)(6) for the probation officer to submit the PSR. In his district they use a 70-day rule of thumb limit but require submission of the Report at least 20 days prior to sentencing; this gives the probation officer 50 days to complete the report. He encourages the Committee to consult with the Judicial Conference on probation matters.

Hon. John D. Rainey
U.S. Dist. Court
Houston, Texas
March 22, 1993

Judge Rainey indicates that he is in complete agreement with the views expressed by Judge Kazen, supra.

Lamont Ramage
Supervising Probation Officer
Austin, Tex.
Feb. 11, 1993.

Mr. Lamont points out that the last sentence in Rule 32(c)(1) should be deleted and the first sentence in (d)(1) should be changed to read, "A judgment of conviction must set forth the plea, the verdict or findings, the adjudication, the sentence, and the reasons for which the sentence was imposed." Addition of a "Statement of Reasons" page to the Judgment and Commitment Order made it unnecessary to attach a separate findings form to the PSI. With regard to the presence of counsel, he suggests that the rule be changed to recognize local restraints. He suggests several alternatives: eliminate the rule; provide for those cases where defendants are in custody; or require US Marshals to produce defendants for the PSI interview. Finally, he notes that the production of statements provision seems inconsistent with the Jencks Act.

David F. Sanders
Probation Officer
Las Vegas, Nev.
Feb. 8, 1993

Mr. Sanders indicates that the time frame contemplated in Rule 32 for completion of the PSR is too short. In support of his position he catalogs all of the tasks that go

into preparing the report. Although he notes that the proposed amendment seems to make sense "intellectually," the press of other duties, computer problems, slow witnesses, and busy counsel create problems. He is troubled by the fact that the attorneys have as much time to read and object to the report as the officer has to do the investigation and prepare the report. He suggests that if the Committee decides to keep the 70-day rule, that it eliminate the attorney conference. Instead, by the 14th day following disclosure, attorneys must file their objections. Ideally, a 90-day rule would be better; that would give the probation officer 40 days.

Hon. Frederick N. Smalkin
U.S. Dist. Court
Baltimore, Md.
April 7, 1993

Judge Smalkin, in his capacity as Chairman of the Probation Committee of the District of Maryland, is strongly opposed to two aspects of the amendment: First, the entitlement of counsel to attend interviews of the defendant conducted by the probation officer. He is concerned that counsel's presence will create a mini-adversarial proceeding and trigger the inevitable request that government counsel be present. Until the Constitution requires counsel's presence, the rule should remain silent. Second, Judge Smalkin indicates that the court is strongly opposed to the setting of time limits for various stages of the sentencing process. Finally, he expresses question the wisdom of condoning disclosure of the probation officer's recommendation to the parties. Some vestige of confidentiality should remain.

Alan T. Solinsky
Probation Officer
Spokane, Washington
April 16, 1993

Probation Officer Solinsky was one of six probation officers signing a letter indicating their deep concern about the time limits in the proposed rule change. They point out the difficulties of obtaining the necessary information for the presentence report in a short period of time. To impose a 35-day rule would downgrade the quality under an already stressed system.

Joseph B. Steelman, Jr.
Deputy Chief Probation Officer
Winston-Salem, N.C.
April 9., 1993

Mr. Steelman recommends an overall time frame of 90 days rather than 70 days and that the rule specify whether the reference to 14 days refers to 14 calendar days or 14 work/court days. He also indicates that the rule should be changed to reflect some additional flexibility in the 7-day time frame for submission to the court. Mr. Steelman also suggests that the rule reflect that defense counsel should not unduly delay the proceedings by not being available for conferences.

Thomas K. Tarr
Chief Probation Officer
Concord, N.H.
April 2, 1993

Mr. Tarr recounts his office's experiences with a local rule similar to the proposed Rule 32 time limits; in his court, however, the overall time limit is 90 days. Citing tremendous problems with workloads, etc., he recommends that the Committee allow at least 49 days, rather than 35 days, to complete the initial PSR. He also recommends an overall time frame of at least 84 or 91 days.

Charlie E. Vernon
Chief Probation Officer
Sacramento, California
Feb. 4, 1993

Mr. Vernon notes that his comments on the proposed amendments are based on his experiences in the Eastern Dist. of California, where the local rules contain time limits almost identical to those in the proposed rule. His chief complaint is with Rule 32(b)(2) which provides for presence of counsel; he urges the Committee to modify the language to require counsel's presence only where the defendant requests such. This would free the probation officer from attempting to locate elusive lawyers before making any contact with the defendant. He assumes that failure to have counsel present will result in suppression motions at sentencing. Turning to (b)(4)(B) he strongly endorses the proposed language which addresses the probation officer's advice regarding guideline classifications. He urges retention of the language. Finally, he expresses concern about the language

in (b)(6)(D) regarding the ability of defense counsel to raising new objections at any time before sentencing. The experience in his district is that counsel use the first draft of the PSR as a discovery device; although the procedures for dealing with objections is virtually identical to the proposed rule, many objections are raised for the first time at sentencing. Their local rule, which seems to work, states: "Except for good cause shown, no objections may be made to the presentence report other than those previously submitted to the probation officer pursuant to Paragraph 6 [same as (b)(6)(B)] and those relating to information contained in the presentence report that was not contained in the proposed presentence report." This provision has not eliminated last minute objections, but has reduced their incidence and the continuances needed to investigate the objections.

G. Wray Ware
Chief Probation Officer
Roanoke, Va.
Feb. 19, 1993

Mr. Wray believes that because the amendments to Rule 32 will make it more like a speedy trial act, the control of time limits should rest with local rules which seem to be working well. He notes that the Probation Department is staffed at 79% of formula and that strictly enforced time limits would have an adverse impact. He indicates that he has discussed the amendments with Judge James Turk and Judge Jackson Kiser, who share his concerns. He recommends that the current generalized language concerning time limits be retained and that the specific time tables be eliminated.

V. TESTIMONY OF WITNESSES: Rule 32

Thomas W. Hillier, Esq.
Federal Public Defender
Seattle, Washington
Testimony on April 22, 1993

Mr. Hillier testified that although the structure of Rule 32 has been improved there are a number of practical problems which must be addressed. First, he stated that the time limits are workable but that there will be problems with the time limits in the rule and that flexibility should be insured. Second, he expressed concern over the role of the probation officer who should really be limited to being an information gatherer. In particular he anticipated problems if the probation officer is given the authority to

require meetings with the parties; the probation officer's task should be to organize the material and information for the court. Third, it is important that the court see the original objections filed with the probation officer. Fourth, defense counsel should be permitted to be present at any meeting between the probation officer and the defendant. Fifth, he encouraged the Committee to consider adding a requirement in the Rule that the prosecution must disclose all relevant sentencing evidence to the defense. Sixth, he recommended that the Committee delete the "local" option provision which presumes that the probation officer's recommendation on sentence will be disclosed unless a local rule provides otherwise; he concerned that the rule will not make any real difference. Seventh, he recommended that the words "in its discretion" be eliminated from subdivision (c)(1) vis a vis the court's decision to hear additional evidence. He noted the trend toward requiring courts to hear such evidence if offered. Finally, he urged the Committee to include a provision requiring that the parties be put on notice that the court intends to depart from the sentencing range.

Hon. Frederick N. Smalkin
U.S. Dist. Court
Baltimore, Md.
Testimony on April 22, 1993

Judge Smalkin's testimony focused on the problem of providing counsel with a right to be present at any interview between the probation officer and the defendant. He noted that currently in his district the defense counsel is permitted to be present if the probation officer and the attorney for the Government agree. He expressed concern that routinely permitting counsel to be present would turn the process into an adversarial hearing, with the U.S. Attorney also desiring to be present so as to avoid ex parte contacts. Judge Smalkin was also opposed to any amendment which would provide counsel notice and a reasonable opportunity to be present. He recommended that the Committee wait for the case law to develop in this area.

Rule 40(d) Amendment
Criminal Rules Advisory Committee
Fall 1992

Rule 40. Committment to Another District

* * * * *

(d) ARREST OF PROBATIONER OR SUPERVISED RELEASEE. If a person is arrested for a violation of probation or supervised release in a district other than the district having jurisdiction, such person shall be taken without unnecessary delay before the nearest available federal magistrate judge. The person may be released under Rule 46(c). The federal magistrate judge shall:

(1) Proceed under Rule 32.1 if jurisdiction over the person is transferred to that district;

(2) Hold a prompt preliminary hearing if the alleged violation occurred in that district, and either (i) hold the person to answer in the district court of the district having jurisdiction or (ii) dismiss the proceedings and so notify that court; or

(3) Otherwise order the person held to answer in the district court of the district having jurisdiction upon production of certified copies of the judgment, the warrant, and the application for the warrant, and upon a finding that the person before the magistrate is the person named in the warrant.

* * * * *

Rule 40(d) Amendment
Criminal Rules Advisory Committee
Fall 1992

COMMITTEE NOTE

The amendment to subdivision (d) is intended to clarify the authority of a magistrate judge to set conditions of release in those cases where a probationer or supervised releasee is arrested in a district other than the district having jurisdiction. As written, there appeared to be a gap in Rule 40, especially under (d)(1) where the alleged violation occurs in a jurisdiction other than the district having jurisdiction.

A number of rules contain references to pretrial, trial, and post-trial release or detention of defendants, probationers and supervised releasees. Rule 46, for example, addresses the topic of release from custody. Although Rule 46(c) addresses custody pending sentencing and notice of appeal, the rule makes no explicit provision for detaining or releasing probationers or supervised releasees who are later arrested for violating terms of their probation or release. Rule 32.1 provides guidance on proceedings involving revocation of probation or supervised release. In particular, Rule 32.1(1) recognizes that when a person is held in custody on the ground that the person violated a condition of probation or supervised release, the judge or United States magistrate judge may release the person under Rule 46(c), pending the revocation proceeding. But no other explicit reference is made in Rule 32.1 to the authority of a judge or magistrate judge to determine conditions of release for a probationer or supervised releasee who is arrested in a district other than the district having jurisdiction.

The amendment recognizes that a judge or magistrate judge considering the case of a probationer or supervised releasee under Rule 40(d) has the same authority vis a vis decisions regarding custody as a judge or magistrate proceeding under Rule 32.1(a)(1). Thus, regardless of the ultimate disposition of an arrested probationer or supervised releasee under Rule 40(d), a judge or magistrate judge acting under that rule may rely upon Rule 46(c) in determining whether custody should be continued and if not, what conditions, if any, should be placed upon the person.

ADVISORY COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 40(d)

I. SUMMARY OF COMMENTS: Rule 40(d)

The Committee received no written comments on the proposed amendment to Rule 40(d).

II. LIST OF COMMENTATORS: Rule 40(d).

None

III. COMMENTS: Rule 40(d).

None

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 5. Initial Appearance Before the Magistrate

(a) IN GENERAL. Except as otherwise provided in this rule, an officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest federal magistrate judge or, in the event that 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 show 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 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 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 $5000 or imprisoned for not more than five years, or both.
>
> * * * * *
>
> Violations of this article 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, one of several options are commonly used by 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 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 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 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.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 10. Arraignment

Arraignment, which must ~~shall~~ be conducted in open court, and ~~shall~~ consists of:

(a) reading the indictment or information to the defendant or stating to the defendant the substance of the charge; and

(b) calling on the defendant to plead to the indictment or information ~~thereto~~.

The defendant must ~~shall~~ be given a copy of the indictment or information before being called upon to enter a plea ~~plead~~. Video teleconferencing technology may be used to arraign a defendant not physically present in court, if the defendant waives the right to be arraigned in open court.

COMMITTEE NOTE

Read together, Rules 10 and 43 require the defendant to be present in court for the arraignment. *See, e.g., Valenzuela-Gonzales v. United States*, 915 F.2d 1276, 1280 (9th Cir. 1990)(Rules 10 and 43 are broader in protection than the Constitution). The amendment to Rule 10, in addition to several stylistic changes, creates an exception to that rule and provides that the court may permit arraignments through video teleconferencing if the defendant waives the right to be present in court. Similar amendments have also been made to Rule 43 to cover other pretrial sessions.

In amending the rule, and Rule 43, the Committee was very much aware of the argument that permitting video arraignments could be viewed as an erosion of an important element of the judicial process. First, it may be important for a defendant to see, and experience first-hand the formal

impact of the reading of the charge. Second, it may be necessary for the court to personally see and speak with the defendant at the arraignment, especially where there is a real question whether the defendant really understands the gravity of the proceedings. And third, there may be difficulties in providing the defendant with effective and confidential assistance of counsel if the two are in separate locations, connected only by audio and video linkages.

The Committee nonetheless believed that in appropriate circumstances the court, and the defendant, should have the option of conducting the arraignment where the defendant is in visual and aural contact with the court, but in a different location. Use of video technology might be particularly appropriate, for example, where an arraignment will be pro forma but the time and expense of transporting the defendant to the court are great. In some districts, defendants have to be transported long distances, under armed guard, to an arraignment which may take only minutes to complete.

A critical element to the amendment is that no matter how convenient or cost effective a video arraignment might be, the defendant's right be present in court stands unless he or she waives that right. As with other rules including an element of waiver, whether a defendant voluntarily waived the right to be present in court during an arraignment will be measured by the same standards. An effective means of meeting that requirement in Rule 10 would be for the court to obtain the defendant's views during the arraignment itself or require the defendant to execute the waiver in writing.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 43. Presence of 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,

(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.

FEDERAL RULES OF CRIMINAL PROCEDURE

(c) Presence Not Required. A defendant need not be present in the following situations:

(1) ~~**A corporation**~~ An organization, as defined in 18 U.S.C. § 18, may appear by counsel for all purposes.

(2) In prosecution for offenses 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 a conference or argument upon a question of law.

(4) At a pretrial session in which the defendant can participate through video teleconferencing and waives the right to be present in court.

~~(4)~~ (5) At a reduction of sentence under Rule 35.

COMMITTEE NOTE

The revisions to Rule 43 focus on three areas and reflect in part similar changes in Rule 10, which governs arraignments. First, the amendments make clear that a defendant who, initially present at trial but who voluntarily flees before sentencing, may nonetheless be sentenced in absentia. Second, the court may use video technology to conduct pretrial sessions with the defendant absent from the courtroom, where the defendant waives the right to be present. Third, the rule is amended to extend to organizational defendants. In addition, some stylistic changes have been made.

FEDERAL RULES OF CRIMINAL PROCEDURE

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 formulation of 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. The Committee envisions that defense counsel will continue to represent the interests of the defendant at sentencing.

The words "at trial" 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. *See Crosby v. United States, supra.*

Subdivision (c). There are two changes to subdivision (c). The first 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.

The second change to subdivision (c) is more significant. New subdivision (c)(4), which parallels a similiar amendment in Rule 10, provides that the court may use video teleconferencing technology to conduct pretrial sessions with the defendant at another location -- if the defendant waives the right to be personally present in court. The Committee balanced the concern that this might dehumanize the judicial process against the fact that some pretrial sesssions can be very brief, pro forma, proceedings. As noted above, the right to be present in court is not an absolute right, and may be voluntarily

waived by the defendant. It is important to note that the amendment does not require the court to use such technology; the rule simply recognizes that the court may, under appropriate conditions, and in full respect of the defendant's rights, use such technology.

Although the Committee did not attempt to further define the term pretrial sessions, the rule could logically extend to sessions such as Rule 5 proceedings, arraignments (as specifically provided for in the amendment to Rule 10), preliminary examinations under Rule 5.1, competency hearings, pretrial conferences, and motions hearings not already within the purview of subdivision (c)(3). The Committee does not contemplate that the amendment would extend to guilty plea inquiries under Rule 11(c).

FEDERAL RULES OF CRIMINAL PROCEDURE*

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 liklihood 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.

FEDERAL RULES OF CRIMINAL PROCEDURE*

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 avaiable to the public at large. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980)(vital role of print and electronic media are surrogates for the public supports opening of courts to audio and camera coverage).